CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 73.

THE FIRST NATIONAL BANK OF JACKSBORO, PLAINTIFF IN ERROR,

vs.

J. L. LASATER.

IN ERROR TO THE COURT OF CIVIL APPEALS OF THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JULY 8, 1904.

(18,983.)

(18,993.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 73.

THE FIRST NATIONAL BANK OF JACKSBORO, PLAINTIFF IN ERROR,

vs.

J. L. LASATER.

IN ERROR TO THE COURT OF CIVIL APPEALS OF THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

INDEX.

	Original.	Print.
Petition for writ of error	1	1
Assignments of error	2	1
Bond for writ of error	4	3
Order allowing writ of error	6	4
Certificate of Federal question	7	5
Writ of error (copy)	11	7
Citation in error	13	9
Citation in error	14	9
Transcript from district court	16	11
Plaintiff's original petition	16	11
Original answer of defendant	20	14
Plaintiff's first supplemental petition	24	16
Defendant's first supplemental answer	26	18
Defendant's trial amendment	27	19
Judgment	28	19
Statement of facts	29	20

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 27, 1904.

	Original.	Print
Order of discharge in bankruptcy	32	22
Report of trustee	33	23
Order discharging trustee	34	23
Testimony of J. L. Lasater	35	24
W. M. Maggard	37	26
A. M. Lasater	38	26
Attorneys' agreement	40	27
Judge's certificate	40	27
Appeal bond	40	28
Assignment of errors	41	29
Clerk's certificate	43	30
Bill of costs	44	30
Opinion of court of civil appeals	45	31
Judgment of court of civil appeals	54	37
Application for rehearing	55	37
Certified question to supreme court of Texas	58	40
Opinion of supreme court of Texas	61	42
Order of court of civil appeals on motion for rehearing	66	45
Bill of costs, supreme court, on certified question	67	45
Application for writ of error	68	46
Judgment of supreme court of Texas refusing writ of error	82	55
Bill of costs, supreme court of Texas, on application for writ of error	82	56
Bill of costs in court of civil appeals	83	57
Certificate of clerk, court of civil appeals	84	57

1 *Petition for Writ of Error.*

In the Court of Civil Appeals of the Second Supreme Judicial District of Texas, at Fort Worth, Texas.

J. L. LASATER, Appellant,
vs.
THE FIRST NATIONAL BANK OF JACKSBORO, TEXAS, Appellee.

The First National Bank of Jacksboro, appellee in the above entitled cause, feeling itself aggrieved by the judgment of the court of civil appeals for the second supreme judicial district of Texas, entered on the 8th day of November, A. D. 1902, comes now by Thos. D. Sporer and E. W. Nicholson, its attorneys, and petitions said court for an order allowing said appellee to prosecute a writ of error to the honorable the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the appellee shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the honorable the Supreme Court of the United States.

Your petitioner respectfully states that it has this day filed herewith its assignments of error committed by the court below in said cause, and intended to be urged by your petitioner and plaintiff in error in the prosecution of this its suit in error.

And your petitioner will ever pray.

THOS. D. SPORER.
2 E. W. NICHOLSON,
Attorneys for Appellee.

Filed in court of civil appeals for second supreme judicial district of Texas, June 4, 1903.

W. C. STRONG, *Clerk.*

Assignments of Error.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas.

J. L. LASATER, Appellant,
vs.
THE FIRST NATIONAL BANK OF JACKSBORO, Appellee.

At law. Assignments of error.

The appellee, The First National Bank of Jacksboro, by counsel, in connection with its petition for a writ of error to the Supreme

Court of the United States, makes the following assignments of error which they aver occurred on the trial and hearing of the cause in the honorable court of civil appeals for the second supreme judicial district of Texas, to wit:

First assignment of error. The court erred in holding that J. L. Lasater, the appellant, had the right to sue for, and recover in this action, the penalty prescribed by section 5198 of the Revised Statutes of the United States, merely because he had been a member of the firm that paid part of the usurious interest, because the penalty is not assignable, and one member of a firm can not sue to re-
3 cover a penalty for usurious interest paid by the firm.

Second assignment of error. The court erred in holding that appellant, after assuming to pay the firm debt, could sue for and recover the entire penalty.

Third assignment of error. The court erred in holding that a payment by A. M. Lasater, who was a joint maker of said note, was a payment by J. L. Lasater; but that the same was made under an agreement between appellant and said A. M. Lasater; and that the reception of such payments by said appellee bank from A. M. Lasater was knowingly received by it as a payment from and for appellant, when appellee bank was not a party to said agreement and was not informed at the time A. M. Lasater paid said note together with the alleged usurious interest that he was making such payment for appellant J. L. Lasater.

Fourth assignment of error. The court erred in holding that said appellant could maintain this suit to recover this penalty, as he had filed his voluntary petition in bankruptcy and had been discharged.

Fifth assignment of error. The court erred in this, to wit, that by the record aforesaid it appears that the judgment of the said court of civil appeals was given for the said J. L. Lasater against the said The First National Bank of Jacksboro, whereas by the law of the land, the said judgment ought to have been given for the said The First National Bank of Jacksboro against the said J. L. Lasater.

Wherefore, the said The First National Bank of Jacksboro prays the judgment aforesaid be reversed, annulled, and altogether held for nothing, and that the judgment of the district court in and for Jack county, in the said State of Texas, rendered in this cause, be in all things affirmed as the proper judgment to be rendered in
4 this cause, and that it may be restored to all things which it has lost by occasion of the said judgment of the said court of civil appeals.

THOS. D. SPORER,
E. W. NICHOLSON,
Attorneys for Appellee, The First National Bank of Jacksboro, Plaintiff in Error to the Supreme Court of the United States.

Filed in court of civil appeals for second supreme judicial district of Texas, June 4, 1903.

W. C. STRONG, *Clerk.*

Bond for Writ of Error.

In the Court of Civil Appeals of the Second Supreme Judicial District of Texas, at Fort Worth, Texas.

J. L. LASATER, Appellant,
vs.
THE FIRST NATIONAL BANK OF JACKSBORO, Appellee.

Know all men by these presents, that we, The First National Bank of Jacksboro, by James W. Knox, its president, and James W. Knox, D. L. Knox, and J. W. Aynes, as sureties, are held and firmly bound unto J. L. Lasater, appellant above named, in the sum of five thousand dollars ($5,000.00) to be paid to the said J. L. Lasater, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated the 29th day of May A. D. 1903.

Whereas, the above named appellee, The First National Bank of Jacksboro, has sued out a writ of error to the honorable the Supreme Court of the United States to reverse the judgment in the above entitled cause by the court of civil appeals for the second
5 supreme judicial district of Texas, at Fort Worth.

Now, therefore, the condition of this obligation is such that if the above named The First National Bank of Jacksboro shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE FIRST NAT. BANK OF JACKSBORO,
By JAMES W. KNOX, *Pt.*
JAMES W. KNOX.
D. L. KNOX.
J. W. AYNES.

THE STATE OF TEXAS,
County of Jack.

Before the undersigned, a notary public in and for Jack county, Texas, on this day personally appeared James W. Knox, D. L Knox and J. W. Aynes, credible citizens in and for Jack county, Texas, who are sureties on a writ of error bond given by the First National Bank of Jacksboro in the cause of J. L. Lasater, appellant, *vs.* The First National Bank of Jacksboro, appellee, in the court of civil appeals for the second supreme judicial district of Texas, and who being first duly sworn on their oaths do say that they have

property to the value of five thousand dollars, ($5,000.00) the same being the penal amount of said bond, over and above the exemptions allowed by law, and subject to execution.

JAMES W. KNOX.
D. L. KNOX.
J. W. AYNES.

Sworn to and subscribed before me this 29th day of May, A. D. 1903.

J. A. JONES,
[L. S.] *Notary Public, Jack County, Texas.*

6 This bond and the sufficiency of the sureties thereon approved by me this the 3rd day of June, 1903.

T. H. CONNER,
Chief Justice Court of Civil Appeals,
Second Supreme Judicial Dist. of Texas.

Filed in court of civil appeals for second supreme judicial district of Texas, June 4, 1903.

W. C. STRONG, *Clerk.*

Order Allowing Writ of Error.

In the Court of Civil Appeals of the Second Supreme Judicial District of Texas, at Fort Worth, Texas.

At a stated term, to wit, the October term, A. D. 1902, of the court of civil appeals for the second supreme judicial district of Texas, held in the court room in the city of Fort Worth, Texas, on the 3rd day of June A. D. 1903.

J. L. LASATER, Appellant,
vs.
THE FIRST NATIONAL BANK OF JACKSBORO, Appellee.

Upon motion of Thos. D. Sporer, Esq., attorney for the appellee, The First National Bank of Jacksboro, Texas, and upon filing his petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the honorable the Supreme Court of the United States the judgment heretofore entered herein and that the same be made a supersedeas, and that the amount of bond on said writ of error be, and hereby is, fixed in the penal sum of five thousand dollars, ($5,000.00).

In testimony whereof, witness my hand this 3 day of June, 1903.

T. H. CONNER,
Chief Justice.

7 In the Court of Civil Appeals of the Second Supreme Judicial District of Texas, at Fort Worth, Texas.

J. L. LASATER, Appellant,
vs.
THE FIRST NATIONAL BANK OF JACKSBORO, Appellee.

I, T. H. Conner, chief justice of the court of civil appeals for the second supreme judicial district of Texas, do hereby certify that this suit was brought by appellant, J. L. Lasater, July 26, 1901, upon the Federal statute to recover from the bank twice the sum of $1526.80 usurious interest paid by it—$3053.60. The appellee, The First National Bank of Jacksboro, demurred to the petition of the appellant both by general and special demurrers and pleaded the general denial and the statute of limitation of two years, and contended, by proper and appropriate pleadings, that appellant had no right to sue for the penalty denounced by the statute. 1st. Because only the person paying the usurious interest, or his legal representatives, are allowed under the statute to sue for it, and that appellant is neither of these since the money was paid by the firm and the other member does not sue. 2nd. That the defendant in error could not maintain this suit to recover the penalty for the usurious interest paid by his partner Maggard, as the penalty is not assignable. 3rd. That he could not maintain this suit because the last payment was made by A. M. Lasater who was jointly and severally bound on the note and does not sue. 4th. That since the usurious interest was paid the appellant Lasater had filed his petition in bankruptcy and been discharged, and that he no longer had any interest in, or claim to, said penalty as the same had vested in the trustee appointed by the court of bankruptcy. The case was tried by the court without a jury who rendered judgment for the bank, and hence this ap-

8 peal.

The facts are substantially as follows: The appellant and one Maggard formed a partnership to deal in cattle, and on the 30th day of March, 1898, borrowed of the bank $4000.00 and executed their joint note with A. M. Lasater as surety for $4350.00 due November 15, 1898, with 10 % interest after maturity. They also mortgaged their cattle to the bank as further security to the said note. The money they borrowed from the bank was all the capital they had. On November 22, 1898, the firm paid $390.90 on said note directing it to be applied to the interest due thereon, and on the same day they borrowed $100.00 more which was added to the note, and after deducting the sum of $390.90 interest due, renewed the same for $4450.00 dating it back to November 15, 1898. It was signed by the same parties as before and bore ten per cent. interest from maturity. On the 17th day of August, 1899, the firm paid on said note $382.90 with no instructions how to apply it, and on the next day paid $167.50 more, instructing the bank to apply it

to the payment of interest, and on the 17th day of November, 1899, the appellant paid $62.00 more with no instructions how to apply it. In the same month of November the said Maggard sold all his interest in the firm to Lasater, the latter assuming all the liabilities, but nothing was said about this claim against the bank; and appellant renewed the note for $4313.50, dating it back to November 16, 1899, payable June 15, 1900, with interest at 10% after maturity. On December 6, 1899, appellant paid $22.50; on June 29, 1900, $15.00, with no instructions as to the application of such payments. On the 15th day of October, 1900, A. M. Lasater, the surety, bought all the mortgaged cattle of appellant and some others and agreed to assume and pay off the note in full consideration of said sale, and executed his note to the bank on the 17th day of said month, taking up the appellant's note; and in June, 1901,
9 paid to the bank the sum of $4457.00 in full of said note, and the bank delivered to appellant his note so taken up. The appellant's last named note was also secured by another mortgage given to the bank on all of the same cattle. On November 19, 1900, appellant filed his petition in bankruptcy in the district court of the United States for the northern district of Texas, and E. H. Cottingham was appointed trustee, and appellant was duly discharged of all his debts on January 7, 1901, and the trustee was discharged of his trust on June 11, 1901. He returned no assets to his trustee—says he had none unless this claim for usury was one. Says he did not tell the trustee or his creditors about this claim for usury. In his schedules he reported that he had no assets except exemptions. After the note was paid by A. M. Lasater and the cattle gotten up, he contended that there were not as many cattle as were represented by appellant and this controversy was afterwards settled by appellant agreeing to pay him $1500.00 for the deficit, and has paid him $500.00 by transferring him his interest in his grandmother's estate.

All the notes from first to last contained usury. The whole amount borrowed was $4100.00, the whole amount paid back was $5497.80, the whole time was two years, six months and seventeen days. The highest legal rate of interest allowed by Texas law was ten per cent. per annum. The whole amount of interest paid was $1397.80—the whole amount of legal interest was $1038.05.

This court of civil appeals reversed the judgment of the lower court and rendered judgment for the appellant, Lasater, for the sum of $2013.80. Whereupon appellee bank filed a motion for rehearing which was overruled by this court. The appellee then applied to the supreme court of Texas for a writ of error, which was
10 denied on the 12th day of May, A. D. 1902.

There *was* involved in this suit the following Federal questions which the court necessarily had to consider in arriving at their conclusions and in the rendition of the judgment in appellant's favor and against appellee, The First National Bank of Jacksboro, to-wit:

1st. The construction of sec. 5198 of the U. S. Revised Statutes

prescribing a penalty against national banks for knowingly charging and receiving usurious interest.

2nd. The construction of the national bankruptcy act of 1898 as to the right of a voluntary banprupt, after he has been discharged, and his estate closed in the bankrupt court, to sue for the recovery of the penalty prescribed by said sec. 5198 U. S. Revised Statutes.

And I further certify that the above case was actually decided and judgment was rendered on the above two Federal questions against the said bank, and that said judgment could not have been rendered without deciding and construing said questions, and that the rights and privileges of said appellee, The First National Bank of Jacksboro, depended upon the construction of the said Federal statutes, and that such decision and judgment was adverse to the said appellee.

Witness my official signature this June 3 A. D. 1903.

T. H. CONNER, *Ch. J.*

I, W. C. Strong, clerk of the court of civil appeals for the second supreme judicial district of Texas, do hereby certify that T. H. Conner, whose name is subscribed to the foregoing order, was, at the time of subscribing same, chief justice of the said court of civil appeals for the se-ond supreme judicial district of Texas, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

11 Witness my hand and the seal of said court at Fort Worth, Texas, this the 3rd day of June A. D. 1903.

[SEAL.] W. C. STRONG,
Clerk of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Filed in the court of civil appeals for second supreme judicial district of Texas, Jun- 4, 1903.

W. C. STRONG, *Clerk.*

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals for the second supreme judicial district of Texas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said court between J. L. Lasater, appellant, and The First National Bank of Jacksboro, appellee, wherein was drawn in question the construction of a clause of a stat-

ute of the United States, to wit: section 5198 of the Revised Statutes of the United Statutes and also of the bankruptcy act of 1898, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said statute, a manifest error hath happened to the great damage of the said The First National Bank of Jacksboro, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then
12 under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 12th day of October A. D. 1903, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the Supreme Court, this the 4th day of June A. D. 1903.

[SEAL.] J. H. FINKS,
Clerk United States Circuit Court for the Northern District of Texas,
By J. B. FINKS, *Deputy.*

Allowed by:
T. H. CONNER,
Chief Justice Court Civil Appeals for Second Supreme Judicial District of Texas.

UNITED STATES OF AMERICA:

In the Court of Civil Appeals in and for the Second Supreme Judicial District of the State of Texas.

In pursuance of the command of the writ of error within*t*, I, W. C. Strong, clerk of the court of civil appeals in and for the second supreme judicial district of the State of Texas herewith transmit a true copy of the record, bills of exception, assignments of error and all proceedings in the case of J. L. Lasater *vs.* First National Bank of Jacksboro, No. 3919 lately pending in the court of civil ap-
13 peals in and for the second supreme judicial district of Texas, at Fort Worth, Texas, under my hand and seal of said court.

Witness my official signature and seal of said court at
[SEAL.] the city of Fort Worth, Tarrant county, Texas, in the year of our Lord one thousand nine hundred and three.

W. C. STRONG,
[SEAL.] *Clerk of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.*

Filed in court of civil appeals for second supreme judicial district of Texas June 4, 1903.

W. C. STRONG, *Clerk.*

Citation in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. L. Lasater, of the town of Hartley, in the county of Hartley, State of Texas, and Howard Martin, Esq., of the city of Weatherford, county of Parker, State of Texas, and Wayne H. Lasater, of the town of Mineral Wells, county of Palo Pinto, State of Texas, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth, Texas, wherein The First National Bank of Jacksboro, Texas, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice
14 of the Supreme Court of the United States of America, this 3rd day of June, A. D. 1903, and of the Independence of the United States the one hundred and twenty seventh.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Attest:
[SEAL.] W. C. STRONG, *Clerk.*

UNITED STATES OF AMERICA, }
State of Texas. }

I hereby certify that I served the within citation on Howard Martin on the 6th day of June, A. D. 1903, at Austin in the county of Travis, State of Texas, by then and there delivering to the said Howard Martin personally, a true copy of the within citation.

Dated at Austin in the county of Travis, State of Texas, this 6th day of June, A. D. 1903.

G. S. MATTHEWS,
Sheriff of Travis County, Texas.

Fee & mil. $1.00.

2—73

UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. L. Lasater, of the town of Hartley, in the county of Hartley, State of Texas, and Howard Martin, Esq., of the city of Weatherford, county of Parker, State of Texas, and Wayne H. Lasater, of the town of Mineral Wells, county of Palo Pinto, State of Texas, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth, Texas, wherein The First National Bank of Jacksboro, Texas, is plaintiff, and you are defendant in error, to show cause, if any
15 there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 3rd day of June, A. D. 1903, and of the Independence of the United States the one hundred and twenty-seventh.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Attest:
[SEAL.] W. C. STRONG, *Clerk.*

UNITED STATES OF AMERICA, }
State of Texas. }

I hereby certify that I served the within citation on Wayne H. Lasater on the 8th day of June, A. D. 1903, at Mineral Wells in the county of Palo Pinto State of Texas, by then and there delivering to the said Wayne H. Lasater personally, a true copy of the within citation.

Dated at Palo Pinto in the county of Palo Pinto, State of Texas, this 8th day of June, A. D. 1903.

T. C. HINDMAN,
Sheriff of Palo Pinto C., Texas,
By W. W. REID, *Deputy.*

Serving citation	.75
Mileage 28 miles	1.40
	$2.15

Filed in court of civil appeals for second supreme judicial district of Texas, June 9, 1903.

W. C. STRONG, *Clerk.*

16 *Caption.*

THE STATE OF TEXAS, }
County of Jack. }

At a term of the district court begun and holden at Jacksboro within and for the county of Jack before the Honorable J. W. Patterson and ending on the 13th day of September, A. D. 1901, the following case came on for trial, to wit:

Plaintiff's Original Petition.

Filed 26 July, 1901.

In the District Court of Jack County, Tx., September Term, A. D. 1901.

J. L. LASATER
vs.
THE FIRST NATIONAL BANK. } No. 1429.

To the Hon. J. W. Patterson, judge of said court, presiding:

This is the petition of J. L. Lasater, a resident citizen of Parker county, Texas, complaining of the First National Bank of Jacksboro, a corporation duly incorporated and engaged in the banking business as a national bank and having its office and place of business in Jacksboro, Jack county, Texas, with James W. Knox as its president, and D. L. Knox is the cashier thereof, both of whom reside in said Jack county, Texas.

For cause of action plaintiff represents that on or about the 30th day of March 1898 plaintiff and one W. M. Maggard of said Jack county entered into an agreement to form a partnership as traders in the cattle business in the firm name of W. M. Maggard Special, which agreement was oral, and was and is in substance that they, said firm, agreed to and did engage in the buying and selling of cattle in Jack and other counties in Texas; that each of said partners were to share equally in the profits and losses of said business; that at the time said partnership or agreement was entered into, said firm's capital stock was $4000.00 in cash, which said sum was borrowed by them for said firm from defendant's said bank, which said sum was deposited in said bank on the 1st day of April, 1898, to the credit of said firm. That the said co-partnership business was entered
17 upon pursuant to said agreement and was carried on under and pursuant to the same up to about the 10th day of May 1899, when the same was dissolved by mutual consent. That at the time of said dissolution plaintiff and said W. M. Maggard had a full and complete settlement of their said co-partnership business, and

by the terms of said dissolution and settlement plaintiff was to take and own in his own right all of the property, accounts, rights and assets of whatsoever kind that belonged to said firm, and plaintiff assumed and agreed to pay all of the indebtedness of said firm of whatsoever kind. That plaintiff since said dissolution has continued said business in his own right and name, and has paid all of the debts of said firm which amounted to about $5000.00. Plaintiff further represents and avers that on or about the 30th day of March 1898 said firm borrowed $4000.00 from defendant bank, which said indebtedness was evidenced by a promissory note for the sum of $4350.00 payable to the order of the said D. L. Knox, the cashier of defendant bank under date of March 30th 1898. The same was signed and executed by plaintiff, and the said W. M. Maggard as principals, and A. M. Lasater as surety. The same was payable on or before the 15th day of Nov. 1898 and bore interest from maturity at the rate of 10 per cent.

That $350.00 of said note was for interest on the said $4000.00 from the said 30th day of March 1898 until the said 15th day of Nov. 1898.

That on to wit; the 22nd day of November, 1898 said firm paid to defendant the sum of $390.90 on said note, and at the same time renewed the said note and executed another note for the sum of $4450.00 which said last named note was for the sum of $4450.00 dated the 15th day of November, 1898, and payable to the said D. L. Knox, cashier on or before the 15th day of July, 1899, and
18 bore interest from maturity at ten per cent. The same was signed and executed by said J. L. Lasater and W. M. Maggard as principals and the said A. M. Lasater as surety.

That on the 15th day of August, 1899 said firm paid $167.50 on said last named note to defendant. That on 17th day of August, 1899, it paid $382.90 on said note to said bank. And on the 17th day of November, 1899, said firm further paid the sum of $62.00 on said note to said bank.

That on or about the 16th day of November 1899 and after the dissolution of said firm as aforesaid plaintiff took up the last described note and executed a renewal note in its stead for the balance due thereon, which said last renewal note was dated Nov. 16th 1899, and was for the sum of $4313.50, payable to said cashier on or before the 15th day of June, 1900, the same bore ten per cent. interest from maturity, and was signed and executed by plaintiff as principal and the said A. M. Lasater as surety.

That on the last described note plaintiff paid the following sums thereon to defendant, to wit: $22.50 on Dec. 6th 1899 and $15.00 on June 29th 1900. Plaintiff represents and avers that he has paid off and fully discharged the last described note of $4313.50 by paying and causing to be paid to said bank the sum of $4486.00 on or about the 17th day of October, 1900; and that he does not now owe said bank any sum on account of the transactions hereinbefore set out.

Plaintiff says that the said $4000.00 is all of the principal of said indebtedness; that the amounts or sums paid in excess of $4000.00 to said bank as aforesaid from the said 30th day of March, 1898 to the said 17th day of October 1900 were for interest demanded, received and collected by said bank from plaintiff and his said firm on the said $4000.00 that was borrowed as aforesaid on the
19 30th day of March, 1898; that is the defendant bank charged demanded received and collected $1526.80 as interest on the said $4000.00 from the 30th day of March 1898 to the 17th day of October, 1900, which amount is greatly in excess of ten per cent. per annum on $4000.00 for said time.

Wherefore, plaintiff says that he has paid at the times and in the manner aforesaid to the defendant the sum of $1526.80 interest charges, all of which accumulated from the first described note that was given as evidence of the said $4000.00 said firm borrowed from said bank on the 30th day of March, 1898, on which defendant had charged and collected from him interest at a greater rate than ten per cent. per annum. That in charging and collecting interest as aforesaid in excess of ten per cent. per annum, defendant violated the laws of the United States and of the State of Texas. That under the laws of this State it is unlawful and usurious to charge and collect interest at a greater rate than ten per cent. per annum, and was so at the time of the various transactions herein set out.

That the defendant acted wrongfully and unlawfully in charging and collecting said usurious interest, and is guilty of usury, as defined by the statutes of the United States and of this State. That said usurious interest was unlawfully and knowingly charged received and collected by defendant.

That by reason of the premises above set out, and of the provisions of the act of Congress regulating national banks and the general laws of the State of Texas regulating the rate of interest and providing penalties for usury, defendant has become, and is, liable to plaintiff in the sum of double the amount of the entire interest charged, received and collected from plaintiff as aforesaid.

Wherefore plaintiff sues, and on hearing asks judgment
20 against the defendant in the sum of $3053.60 as same is above set out, for costs and such other and further relief, both general and special as he may show himself entitled, and he will ever pray, etc.

WAYNE H. LASATER,
HOWARD MARTIN,
Attorneys for Plaintiff.

Original Answer of Defendant.

Filed Sept. 3rd, 1901.

In District Court, Sept. Term, 1901.

J. L. LASATER
vs.
THE FIRST NATIONAL BANK. } No. 1429.

Now comes the defendant, The First National Bank, and files this its original answer herein, and excepts to plaintiff's petition that the same shows no cause of action and of this he prays the judgment of the court.

And further excepting he says that the said petition is insufficient in law for the further reason-, to wit:

1st. For he asks to recover for the pretended usurious interest paid by his alleged partner W. M. Maggard.

2nd. The petition shows that $390.00 is barred by the statute of limitation, having been paid on Nov. 22, 1898.

3rd. For the petition shows that $350.00 of said note was for interest of said $4000.00 note from its date March 30th 1898 until the date of its maturity Nov. 15, 189*0*, and that this amount was not paid but was simply included in the note.

4th. Because said petition alleges that said partnership paid on Nov. 22, 1898, the sum of $390.90 on the note for $4350 of date March 30, 1898, and payable Nov. 15, 1898, and on August 5, 1899, the sum of $167.50. and on August 17, 1899, the sum of $382.90, and on Nov. 17, 1899, the sum of $62.00, which
21 amounts are alleged to have been paid on the note for $4450.00 of date Nov. 15, 1898, and payable on July 15, 1899, because said plaintiff can not recover but for his interest the interest paid by himself on account of usurious interest.

Wherefore he prays judgment of the insufficiency of said petition, and that he be dismissed with his costs, etc.

THOMAS D. SPORER,
Attorney for Defendant, The First National Bank.

And now comes the defendant, by attorney, and denies all and singular the allegations in plaintiff's petition and of this he puts himself upon the country. Wherefore he prays judgment etc.

NICHOLSON & FITZGERALD,
THOMAS D. SPORER,
Attorneys for Defendant.

And for further answer herein defendant says:

1st. That since the transaction alleged in plaintiff's petition the said plaintiff filed his voluntary petition as a bankrupt for discharge

in bankruptcy in the district court of the United States for the northern district of Texas, sitting in bankruptcy, and that by an order made by said court said J. L. Lasater received his discharge in bankruptcy; that by reason of said proceedings in bankruptcy the said Lasater ceased to have any further right or interest in and to any of the property that may have belonged to his said estate, and that in said proceedings E. H. Cottingham was appointed trustee of the estate of the said Lasater and that the said Lasater by reason thereof has no longer any interest in, or claim to, the subject matter of this suit; that the same has vested in said trustee and
22 that he alone is entitled to sue for the same for the use and benefit of the creditors of said Lasater.

2nd. That at the time that the alleged partnership was dissolved between said plaintiff and said Magg-rd that said Magg-rd did not sell, transfer or assign to plaintiff any right to sue for and recover the penalty for usurious interest that said firm may have paid to said defendant bank on the alleged note that they executed to D. L. Knox, as cashier of the defendant, and defendant denies the allegations in plaintiff's petition, if there be any such allegation, that plaintiff by an agreement with said Maggard succeeded to the right to sue for said penalty.

3rd. Said defendant bank further answering herein denies that said plaintiff has paid any usurious interest to said bank whatever; that none of the payments on said notes as alleged in plaintiff's petition were made as payments of interest but were payments made generally on said note and were as such entered as credits on said notes and defendant especially denies that plaintiff made any payment of $486.00 on said note as interest or any other way; that when the first note of $4350.00 was executed on March 30, 1898, by said firm due Nov. 15, 1898, the interest of $350.00 charged on said note was never paid by said firm, nor by said Lasater, nor was it ever received by defendant's bank; that the said first note nor any interest thereon was never paid by said firm or by said Lasater but that the same was renewed as alleged in plaintiff's petition by the execution by said firm of a new note for the sum of $4450.00 and that the alleged payment of $390.00 as usurious interest on said note was not paid in cash but that said new note was placed to the credit of said firm on the books of said bank for its full amount, and then the said Lasater, or said firm, drew a check for
23 $390.00 against said credit and thus, in this manner, the said payment was made; that said credit was $390.00 instead of $390.90; that defendant bank now especially denies that said firm ever made any such payment on said note, of $167.50 as plaintiff alleges he made on August 15, 1899, either as a credit on said note or as a payment of interest thereon.

4th. Defendant bank further answering denies that plaintiff has ever paid off said note to said bank in any manner; that at the time said money was borrowed from said bank it was borrowed by said firm for the purpose of investing the said money in cattle and

the same was invested in cattle and that the said firm executed to said bank a deed of trust, or instrument commonly known as a chattel mortgage; that sometime thereafter, as alleged in plaintiff's petition said partnership was dissolved and said W. M. Maggard transferred all interest that he had in said cattle unto the plaintiff but defendant denies that said Maggard transferred or assigned to plaintiff any interest in, or right to recover the penalty against said bank for taking and receiving usurious interest as alleged by plaintiff or any right to sue therefor; that thereafter, and prior to plaintiff's filing his said petition for discharge in bankruptcy, plaintiff bargained, sold and delivered all the cattle as aforesaid unto one A. M. Lasater in consideration that said Lasater should pay off and discharge said note; that when said transaction was had by plaintiff with said A. M. Lasater there was no understanding or agreement that plaintiff reserved the right to sue for and recover the penalty aforesaid for payment of usurious interest which plaintiff alleges in his said petition that he paid to defendant bank; that by reason thereof plaintiff can not now recover the said penalty which
24 he sues for in his petition and this defendant is ready to verify.

Wherefore defendant prays that on final hearing hereof he have judgment against the plaintiff, both general and special, and all costs of suit.

NICHOLSON AND FITZGERALD,
THOS. D. SPORER,
Attorneys for Defendant, The First National Bank, Jacksboro, Texas.

Plaintiff's First Supplemental Petition.

Filed Sept. 5th, 1901.

In District Court of Jack County, Texas, September Term, A. D. 1901.

J. L. LASATER
vs.
FIRST NATIONAL BANK OF JACKSBORO, TEXAS. } No. 1429.

Now comes the plaintiff, and with leave of the court files this his first supplemental petition, and excepts to defendant's answer filed herein, and says the same shows no valid defense to plaintiff's cause of action.

And for further and special exceptions to said answer the plaintiff excepts to all that part or portion that sets up that plaintiff is a bankrupt, and has been declared and discharged as such in the district court of the United States for the reason that the same is no defense to the plaintiff's cause of action.

WAYNE LASATER &
HOWARD MARTIN,
Att'ys for Plaintiff.

And for further reply to said answer, plaintiff denies all and singular the allegations contained in defendant's said answer, and calls for strict proof of same.

And for special reply to defendant's said answer, plaintiff says, that while it is true that the principal of the loan, to-wit: $4000.00, was borrowed from the defendant bank during the existence of the firm, but before any usurious interest was paid thereon to the
25 defendant bank, said firm had dissolved, and plaintiff was the sole owner of all the assets of said firm, and was liable for all the debts of said firm; and that the usury that was paid on said loan was paid by the plaintiff after the dissolution of said partnership or firm; that the credits that were paid during the existence of the firm by said firm to defendant bank, as is shown in plaintiff's original petition, were paid in the principal of said loan, and not as interest thereon.

Plaintiff says that it is true, as alleged by defendant, that said firm borrowed said $4000.00 from defendant for the purpose of investing the same in cattle, and that the same was invested in cattle, and that said firm did execute to said bank a deed of trust or chattel mortgage on said cattle and that some time thereafter said partnership was dissolved, and said W. M. Maggard transferred all his interest in said cattle and partnership property unto the plaintiff, and that plaintiff bargained, sold and delivered all of said cattle unto said A. M. Lasater. Plaintiff says that at the time he sold and transferred said cattle unto the said A. M. Lasater, the $4313.50 note was past due and unpaid; and that when he delivered said cattle to A. M. Lasater the said Lasater agreed and promised to pay the said bank said note for plaintiff. And plaintiff says that the said A. M. Lasater did on or about the 17th day of November 1900, pay off said note to the bank; that the same was paid by the said A. M. Lasater for the benefit of and on behalf of plaintiff, that is said Lasater bought said cattle from plaintiff and instead of paying plaintiff directly for the cattle the purchase price of the same, he at the instance of plaintiff and for his benefit paid plaintiff's said debt of $4313.50 and the accrued interest thereon. That the said A. M. Lasater was not paying his own debt when he paid
26 said note, but was paying plaintiff's debt at plaintiff's instance, with plaintiff's property and money and for his use and benefit.

Plaintiff does not know the exact amount that A. M. Lasater paid defendant for him on or about the 17th day of November 1900, but he charges it to be $4457.00 that it was the said $4313.50 note with the accrued interest thereon. That of the amount so paid by said A. M. Lasater for plaintiff, $1526.80 was usuay as plaintiff has more fully set out in his original petition.

WAYNE LASATER,
HOWARD MARTIN,
Attorneys for Plaintiff.

Defendant's First Supplemental Answer.

Filed Sept. 5th, 1901.

In District Court, Jack Co., Texas, September Term, 1901.

J. L. LASATER
vs.
THE FIRST NATIONAL BANK, JACKSBORO, TEXAS. } No. 1429.

Now comes the defendant, The First National Bank of Jacksboro, Texas, and leave of the court being first had and obtained files this his first supplemental answer and excepts to plaintiff's first original petition and to his first supplemental petition, because;

1st. Neither of the same are verified by the oath of plaintiff as is required by law, and

2nd. That neither of same allege with sufficient definiteness and particular-y that the payments alleged to have been made on said notes, or either of them, were made in payment of usurious interest and that the sums of money so paid had been applied, or had not been applied, by mutual consent to the payment of the said usurious interest.

3rd. And specially excepting to plaintiff's first supplemental petition he says that same does not show any cause of action against said bank nor does it show any valid replication to defendant's original answer.

27 4th. Because the said first supplemental petition shows that the plaintiff had parted with all right and interest in said note to A. M. Lasater and that he made no payment of usurious interest on said note.

Wherefore he prays judgment of the court.

THOS. D. SPORER &
NICHOLSON & FITZGERALD,
Attorneys for Defendant, The First National Bank.

And now comes the defendant, by attorneys, and denies all and singular the allegations in plaintiff's petition and of this he puts himself upon the country.

Wherefore he prays judgment, etc.

THOS. D. SPORER &
NICHOLSON & FITZGERALD,
Attorneys for Defendant.

Def't's Trial Amendment.

Filed Sept. 5th, 1901.

In District Court, Jack County, Texas.

J. L. LASATER
vs.
FIRST NAT'L BANK OF JACKSBORO. } No. 1429.

And now comes defendant and asks leave of the court to file a trial amendment and for plea herein says that the payment of $350.00 made on March 30th 1898 was made more than two years prior to the institution of this suit, and that the payment of $390.90 made on Nov. 22, 1898 was made more than two years prior to the institution of this suit. That neither of said payments can be recovered in this suit because same were made more than two years prior to the institution of this suit. Wherefore defendant prays judgment of the court.

THOS. D. SPORER AND
NICHOLSON & FITZGERALD,
Att'ys for Def't.

28 *Judgment.*

J. L. LASATER
vs.
THE FIRST NATIONAL BANK OF JACKSBORO, TEXAS. } No. 1429.

6TH DAY OF SEPTEMBER, A. D. 1901.

This day came the parties to this cause, by their attorneys, and then came on to be heard the defendant's general and special exceptions to plaintiff's original petition and the argument of counsel thereon being heard, it is the opinion of the court that the law is for the plaintiff.

It is therefore considered by the court that all of said exceptions be overruled. To all of which defendant excepted. And then both plaintiff and defendant announced ready for trial on the merits of the case, a jury having been waived by both plaintiff and defendant, and the matters of fact and of law were left and submitted to the court, and after the court had heard all of the evidence adduced on the trial, the court is of the opinion that the plaintiff is not entitled to recover of defendant any sum in this cause. It is therefore ordered, considered and decreed by the court that the plaintiff J. L. Lasater, take nothing in this case and that defendant, The First National Bank of Jacksboro go hence without day.

It is further ordered by the court that the defendant The First National Bank of Jacksboror, do have and recover of and from the plaintiff, J. L. Lasater, all costs in this case expended and that the officers of this court do have and recover of and from plaintiff and defendant all costs created by them respectively, for all of which let execution issue.

To all of which ruling and judgment of the court the plaintiff excepted and in open court gave notice of appeal to the court of civil appeals of and for the second supreme judicial district
29 of Texas. It is further ordered on motion of plaintiff that both parties shall have ten days from the adjournment of court in which to make and have filed a statement of facts in this cause.

Statement of Facts.

Filed Sept. 13th, 1901.

In the District Court, Jack County, Texas, September Term, 1901.

J. L. LASATER
vs.
THE FIRST NATIONAL BANK OF Jacksboro, Texas. } No. 1429. Statement of Facts.

Be it remembered that upon the trial of the above styled and numbered cause the following facts were proven and evidence introduced.

1st. It was admitted on the trial that plaintiff, J. L. Lasater and W. M. Maggard entered into and formed a copartnership on the 30 day of March, 1898; that the object and purpose of the partnership was to deal in the business of buying and selling cattle; that the partnership carried on said business in the firm name of W. M. Maggard, Special. That they were equal partners in said business; that is they were to share equally in the profits and losses of the business.

That said firm or partnership did engage in and carry on said business from the 30th day of March 1898 until the 1st day of September, 1899; that in the fall of 1899 said firm or partnership was dissolved by mutual consent of the parties thereto; that by the terms of the dissolution plaintiff was to continue said business and have in his own right all of the property or assets of the firm and was to assume the payment of all of the indebtedness of the firm. But there was not anything said or considered about any claim for usury that the firm might have against defendant bank. The claim for usury, if any, was not mentioned by either party to the dissolution.

2nd. It was proven on the trial that said firm borrowed
30 $4000.00 from defendant The First National Bank of Jacksboro on the 30th day of March, 1898, which indebtedness was evi-

denced by a promis-ory note for the sum of $4350.00 payable to D. L. Knox, the cashier of the defendant; said note was dated 30th day of March 1898 and was payable on the 15th day of Nov. 1898. The same was signed by plaintiff, W. M. Maggard, and A. M. Lasater, and bore interest from maturity at the rate of ten per cent. per annum; that the note was made for $4350.00 when only $4000.00 was borrowed; that on the 22nd day of Nov. 1898 said firm paid defendant the sum of $390.90 on said note, and directed the defendant to apply it to the payment of interest.

That on the said 22nd day of Nov. 1898 being the same day of said payment said firm renewed the $4350.00 note and borrowed from defendant $100.00 more. That after paying the $390.90 on the first note, and adding to the balance due the $100.00 the second note or renewal note was given for $4450.00. It was dated back to Nov. 15, 1898, and was payable to the said cashier of defendant on the 15th day of July, 1899, and was signed by the same parties, as first note and bore interest at 10 per cent. from maturity. That on the 17th day of August, 1899, said firm paid to defendant $382.90 on the last described note and at the time it was paid there was no instructions given as to what or how it should be applied. That on the next day the 18th day of August, 1899 said firm paid $167.50 more on said note, but instructed the defendant to apply it to the payment of interest. And on 17th day of November, 1899, plaintiff paid $62.00 on said note with no instructions as to how to apply it.

That on the — day of November 1899, and after the dis-
31 solution of the partnership plaintiff took up the last described note, and executed a renewal note in its stead, which said last renewal note was for $4313.50, dated (back) Nov. 16th 1899, payable to said cashier on the 15th day of June, 1900. The same was signed by plaintiff and the said A. M. Lasater, and bore 10 per cent. interest from maturity. That on the last described note plaintiff paid the following sums: $22.50 on Dec. 6th, 1899, and $15.00 on June 29, 1900, and at the time said payments were made, there were no instructions as to what and how the payment should be applied. That on the 17th day of October 1900, the said A. M. Lasater paid off said last described note, by paying to defendant the sum of $4457.00. That he paid said $4457.00 in the way and under the circumstances hereinafter shown in the testimony of plaintiff and the said A. M. Lasater. That after A. M. Lasater paid off said note defendant delivered the same to plaintiff. That from the 30th day of March, 1898 until the 17th day of Oct. 1900 said firm only borrowed $4100.00 from defendant, and that at the times heretofore shown, to wit: $4000.00 on March 30th 1898, and $100.00 on Nov. 22, 1898. And that during said time said firm and plaintiff and the said A. M. Lasater paid defendant $5497.80 at the times and under the circumstances herein shown.

That A. M. Lasater was only surety on said notes as between plaintiff Maggard and himself, but the forms of the notes made him primarily liable to defendant. That to secure the payment of the

last described note plaintiff executed a mortgage to defendant on all of the cattle he had purchased with said money under circumstances hereinafter shown by the testimony of plaintiff & A. M. Lasater.

3rd. It was admitted on the trial that plaintiff on the 19th
32 day of November 1900 filed his voluntary petition as a bankrupt for discharge in bankruptcy in the district court of the United States for the northern district of Texas, sitting in bankruptcy, and that E. H. Cottingham was appointed trustee of plaintiff's estate in said bankrupt proceedings.

That plaintiff "was discharged as a bankrupt by said court on the 7th day of January, 1901."

The order of discharge was introduced in evidence which is as follows:

District Court of the United States, Northern District of Texas.

Whereas, John L. Lasater of Palo Pinto county, in said district has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said John L. Lasater be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 19th day of November, A. D. 1900 on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable Edward R. Meek, judge of said
[SEAL.] district court. and the seal thereof, this 7th day of January, A. D. 1901.

EDWARD R. MEEK,
United States District Judge.

Endorsed: No. 206. Bankruptcy. *In re* J. L. Lasater, bankrupt. Order of discharge. Filed January 7th, 1901, J. H. Finks, clerk, by J. B. Finks, deputy.

In the United States Court for the Northern District of Texas, at Fort Worth.

I, J. H. Finks, clerk of the United States district court for
33 the northern district of Texas, at Fort Worth, do hereby certify that the foregoing is a full, true and correct transcript and copy of the original order of discharge of John L. Lasater bankrupt.

Dated January 7th, 1901, and entered of record in the matter of No. 206 bankruptcy. John L. Lasater bankrupt, all of which appears from the records of said court, now in the clerk's office at Fort Worth, Texas.

In testimony whereof. I hereunto affix the seal of the said United States district court at Fort Worth and sign the name of the clerk thereof, this the 7th day of September, A. D. 1901.

J. H. FINKS,
Clerk United States Court, Northern District of Texas,
[SEAL.] By J. B. FINKS, *Deputy.*

The report of E. H. Cottingham, trustee was introduced, which is as follows:

In the District Court of the United States for the Northern District of Texas.

In the Matter of J. L. LASATER, Bankrupt. No. 205. In Bankruptcy.

Now comes E. H. Cottingham, trustee in the above entitled cause and reports to the court that as said trustee he has neither received or paid out any money on account of said estate. That after due search he has been unable to find any property belonging to said estate other than that set out in the report on exemptions heretofore filed, and verily believes there is none such. Therefore he prays that he be allowed the fee provided by the act, and that he be discharged as trustee of said estate.

E. H. COTTINGHAM.

STATE OF TEXAS, }
County of Dallas. }

Before me, Sam Turner, a notary public in and for the county of Dallas and State aforesaid, comes E. H. Cottingham, personally known to me to be the party whose name is affixed to
34 the foregoing instrument, and makes oath and says that he executed the same for the purpose and consideration set out therein, and that the same is true.

[SEAL.]

SAM TURNER,
Notary Public, Dallas County, Texas.

The foregoing is endorsed as follows, to wit:
No. 205. John L. Lasater, bankrupt. Final report of E. H. Cottingham. trustee. Filed Feb. 7, 1901. G. P. Meade ref.

In the District Court of the United States for the Northe-n District of Texas, at Fort Worth.

I, J. H. Finks, clerk of the district court of the United States for the northern district of Texas, do hereby certify that the above and foregoing is a full true and correct copy of the original final report of E. H. Cottingham, trustee in cause No. 206 in bankruptcy. John

L. Lasater bankrupt, as fully as the same remains on file and of record in my said office at Fort Worth, Texas.

In testimony whereof witness my hand and the seal of said court, at Fort Worth, Texas, this the 7th day of September, A. D. 1901.

[SEAL.] J. H. FINKS, *Clerk*,
By J. B. FINKS, *Deputy*.

The order discharging trustee was introduced in evidence, which is as follows:

In the District Court of the United States for the Northern District of Texas.

In the Matter of JOHN L. LASATER, Bankrupt. No. 205. In Bankruptcy.

Order Discharging Trustee.

The final report of E. H. Cottingham, trustee of the estate of said bankrupt, having been examined and found to be correct, it is ordered that the same be approved and that said trustee be discharged of his trust.

35 G. P. MEADE,
Referee in Bankruptcy.

Filed 11 day of June, 1901, at 12 o'clock m.

J. H. FINKS, *Clerk*,
By J. B. FINKS, *Deputy*.

In the District Court of the United States for the Northern District of Texas, at Fort Worth.

I, J. H. Finks, clerk of the district court of the United States for the northern district of Texas, at Fort Worth, do hereby certify that the above and foregoing is a full, true and correct copy of the original order of discharge of the trustee, as fully as the same remains on file and of record in my said office at Fort Worth, Texas.

In testimony whereof witness my hand and the seal of said court at Fort Worth, Texas, this the 7th day of September, A. D. 1901.

[L. S.] J. H. FINKS, *Clerk*,
By J. B. FINKS, *Deputy*.

J. L. LASATER, plaintiff, testified as follows:

I am the plaintiff in this case. A. M. Lasater is my uncle. When we borrowed the $4000.00 from defendant he went on the note with us; he was surety on the note; he did not sign them as such but he was such in fact. He never got any of the money. Maggard

and I borrowed the $4000.00 to buy cattle with. In addition to getting A. M. Lasater on the notes we gave a mortgage to the bank on all of the cattle we bought. On the 15th day of October 1900, I sold A. M. Lasater all of the cattle the defendant had a mortgage on, and some other cattle I owned. There were about 250 head consisting of stock cattle and steers. He agreed and prom-
36 ised to pay me the amount I owed the bank for the cattle. That is, he agreed to take the cattle and pay off the note which I owed to defendant and on which he was surety and being same note on which I now claim the usury in this suit. He bought the cattle from me with the understanding that he was to pay said debt as the purchase price of the cattle. I delivered him the cattle on 16th day of Oct. 1900. He paid defendant on or about the 17th day of Oct. Before I sold him the cattle I had thought of suing defendant for the usury it had charged me, but, A. M. Lasater pursuaded me not to do so, and I told him I would not. But I changed my mind. At the time I sold the cattle to my uncle A. M. Lasater there was not anything said about the usury in the debt he was to pay. I did not reserve the right to sue for it. I called at the defendant bank a few days after my uncle had paid the note, and the president of the bank gave it to me and informed me that uncle had paid it. When we borrowed the money the president of the bank told me they would only charge me 12 per cent. per annum. I do not know what induced uncle to buy the cattle from me; it may have been because he was surety on the note, and wanted to protect himself. Yes, I voluntarily filed my petition in bankrupt court asking to be discharged from my debts. I was so discharged on 7th day of January, 1901. I filed my petition on the 19th day of November, 1900. I owed about $6000.00 of debts that I have been discharged by virtue of said bankruptcy proceedings. I did not turn in my assets to the trustee of my estate in my schedule. I did not have any unless this usury claim is one. I did not tell the trustee about this claim or the creditors. There was a creditor's meeting. I had the notes with me at the creditor's meeting and showed them to Mr. Mead the referee and explained to him about me having owed the bank the amount I owed it, and the cattle
37 trade with my uncle. My estate did not pay anything on my indebtedness. I have been discharged from the payment of my debts. At the time I sold uncle my cattle there was not any thing said about me paying him the difference between the amount he should realize from the cattle and the amount of indebtedness he should pay for me to defendant; but since he paid it he claimed there was not as many cattle as I represented there was, and they were not as good as he thought they were, and as he did not realize $4457.00 out of them by about $1500.00 I have agreed to pay him the difference and have already paid him $500.00 by selling him my interest in grandmother's estate, and I have promised to pay him the balance when I can. After I was discharged in bankruptcy I changed my mind about suing for this claim for usury. The reason

I did so was because I concluded I needed the money in my business. In my conversation with Referee Mead I did not tell him anything about there being any usurious interest charged in said note.

W. M. MAGGARD a witness for defendant being duly sworn testified as follows.

I am acquainted with J. L. Lasater. J. L. Lasater and I entered into a co-partnership for the purpose of buying, handling and selling cattle, the said co-partnership being under the firm name of W. M. Maggard Special. I sold out to said J. L. Lasater all of my interest in the said co-partnership business some time during the fall of 1899, the terms of said sale being, that the said J. L. Lasater was to take all of the cattle and assets of said firm of W. M. Maggard Special and was to pay off and discharge all debts due by said firm. In said trade I did not sell my right, or any right, to J. L. Lasater to sue the First National Bank of Jacksboro, Texas or any one else,
for a penalty for charging of usurious interest; nothing of
38 this kind was mentioned to me by said J. L. Lasater or any one else, and I did not sell any such right of action. If there ever was any such right in me it still belongs to me.

A. M. LASATER having been duly sworn says:—

The plaintiff is my nephew. When he and W. M. Maggard entered into a partnership to go into the cattle business they wanted to borrow $4000.00 from defendant bank. I signed the three notes in evidence in this case to assist them in getting the money. I did not get any of the money myself. Although I was primarily liable to the bank on the notes; as between myself and them I was a surety on the notes as additional security to the bank they gave a deed of trust or mortgage on the cattle they bought to defendant; this was the understanding when I signed the note; at least it was when I signed the last two. The mortgage was given for my benefit really. I requested rather than the bank. After plaintiff and Maggard dissolved partnership there was one renewal note given for $4313.50. I signed it as I did the others. This note came due on the 15th day of June, 1900. It was not paid, and in Oct. after it came due I saw I was going to have to pay the note as the plaintiff was in debt and was not able to pay it; and in order to protect myself I made a trade with the plaintiff, the terms of which were that I bought from plaintiff all of the cattle the defendant had a mortgage on to secure the payment of said note, and some other cattle he owned, besides those the mortgage covered. I agreed with plaintiff that I would pay off said note in consideration of him selling and delivering to me said cattle. I agreed to take the cattle and pay off said note, which I did I paid the note soon after he delivered the cattle to me by giving the bank my note. I paid the defendant this note of mine I paid which was in June 1901 $4457.00.
That was the amount they said was due on the note. There
39 was not any price agreed upon for the cattle other than I should pay off the note for the cattle. I thought at that time

that I could realize enough out of the cattle to bring me out even, but there was not as many cattle as plaintiff represented there was, and they were not as good a grade of cattle as he represented them to be. I did not learn this until I had paid the note. The cattle, I have sold some of them, and have the remainder yet. I will not realize more than $3200.00 out of them. At the time we made the trade there was not anything said as to whether or not the plaintiff should reimburse me for the difference, if any, in the amount between what I realized from the cattle and the amount I should pay defendant to pay off said $4313.50 note. But since then, and since it was discovered that the cattle were short in numbers and quality, he has agreed to reimburse me for the difference, which is between $1300.00 and $1500.00. He has already paid me $500.00, by selling to me his interest in his grandmother's estate. He has not yet made me the deed but has agreed to do so. I did not buy the cattle to speculate on, would not have bought them if I had not have been on the note. At the time I bought the cattle I thought I would realize enough out of them to pay the note with, and would have done so, if the cattle in numbers and quality had have been as he represented them. I had not seen all of the cattle when I bought them and when I paid off said note. When I bought the cattle plaintiff did not reserve the right to sue for usury or the penalty on account of usury. A short time before I bought the cattle he told me he was going to sue defendant for usury that they had charged him on said note. I told him that that would be too low down for a white man, and thought I had talked him out of the notion.

40 We the undersigned attorneys representing the plaintiff and defendant in the above styled and numbered cause, do hereby agree that the foregoing pages, or "statement of facts" contain all of the facts proven, or evidence introduced, upon the trial of said cause.

WAYNE LASATER &
HOWARD MARTIN,
Att'ys for Pl't'ff.
THOS. D. SPORER AND
E. W. NICHOLSON,
Attorneys for Def't.

I, J. W. Patterson, judge of the 43rd judicial district of Texas do hereby certify that I have examined the foregoing statement of facts, and have found the same to be true and correct and approve the same in all things.

J. W. PATTERSON,
Judge 43 Judicial District.

Appeal Bond.

Filed Sept. 30th, 1901.

In the District Court of Jack County, Texas.

J. L. LASATER
vs.
FIRST NATIONAL BANK OF JACKSBORO. } No. 1429.

Whereas in the above numbered and entitled cause pending in the district court of Jack county, Texas, and at a regular term of said court, to wit, on the 6th day of September, 1901, judgment was rendered that the plaintiff take nothing and that the defendant go hence and recover of and from the plaintiff the costs of suit, from which judgment the said J. L. Lasater, plaintiff, has taken an appeal to our court of civil appeals for the second supreme judicial district of the State of Texas, and desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, we, J. L. Lasater as principal and Howard
41 Martin, Wayne Lasater and L. P. Cunningham as sureties, acknowledge ourselves bound to pay to the said First National Bank of Jacksboro, Texas, the sum of one hundred ($100) dollars conditioned that the said J. L. Lasater shall prosecute his appeal with effect and in case the judgment of the supreme court or court of civil appeals shall be against him, that he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him in said cause.

Witness our hands this 23rd day of September, 1901.

JOHN L. LASATER,
By his att'y, H. MARTIN.
HOWARD MARTIN.
WAYNE H. LASATER.
L. P. CUNNINGHAM.

Approved Sept. 30th, 1901.

J. A. ROUSE,
District Clerk.

Assignment of Errors.

Filed December 10th, 1901.

In the District Court of Jack County, Texas.

J. L. LASATER
vs.
THE FIRST NATIONAL BANK OF JACKSBORO. } No. 1429. Assignment of Errors.

And now comes the defendant J. L. Lasater, and files the following assignment of errors, to wit:

1st. The court erred in rendering judgment for the defendant, and in not rendering judgment for the plaintiff upon the facts of the case, because the uncontradicted evidence shows that defendant knowingly charged, demanded and collected from plaintiff the sum of $1397.80 usurious interest on a loan of $4000.00. The proof being that said loan was made on the 30th day of March, 1898; that the same was finally paid to defendant by plaintiff on the 17th day of October 1900; that for the use of said $4000.00 for said time, to wit

42 31½ months defendant charged and collected from plaintiff and his firm of which plaintiff was a member and sole successor thereof the said sum of $1397.80 as interest, which was more than 10 % per annum on said $4000.00, the principal of said loan.

2nd. The court erred in holding that plaintiff's claim, demand, or cause of action against defendants, which accrued to him on account of usurious charges of interest, had been divested out of plaintiff and was invested in E. H. Cottingham, plaintiff's trustee in bankruptcy, because the same is not within the meaning of the Federal bankrupt law such an asset or demand that invests in a trustee in bankruptcy, for the reason that such a claim or demand is a penalty when double the amount of the usurious interest collected is sought to be recovered.

3rd. The court erred in holding that the plaintiff could not recover against defendant double the amount of the usurious interest it had collected from him on account of him having taken and received the benefit of the Federal bankrupt law, as plaintiff's demand or cause of action had been divested out of him and had been by virtue of said bankrupt proceedings invested in E. H. Cottingham his trustee in bankruptcy because the uncontradicted evidence shows, (1) That said trustee never in any way controlled the claim or demand or sought or attempted to do so, but had abandoned the same by leaving it in charge of plaintiff. (2) It shows that plaintiff's cause or proceedings in bankruptcy was duly closed in the Federal court; that plaintiff was duly "discharged" as a bankrupt by said court; that said trustee was by said court duly released and

discharged from his trust before the filing of this suit. Hence if the right of action was ever divested out of plaintiff by virtue of said bankrupt proceedings, and had become invested in said
43 trustee, it was reinvested in plaintiff when said trustee was discharged and said bankrupt proceedings closed.

WAYNE H. LASATER &
HOWARD MARTIN,
Attorneys for Plaintiff.

THE STATE OF TEXAS, }
County of Jack. }

I, J. A. Rouse, clerk of the district court in and for said county and State do hereby certify that the above and foregoing is a true and correct transcript of all the proceedings had in the above numbered and entitled cause in the district court in and for said county.

Given under my hand and seal of office at Jacksboro, this the 21st day of December, A. D. 1901.

[SEAL.] J. A. ROUSE,
Clerk District Court, Jack County, Texas.

44 *Bill of Costs, District Court.*

J. L. LASATER
vs.
THE FIRST NATIONAL BANK OF JACKSBORO, TEXAS. } No. 1429.

Clerk's fees:

Issuing writ of citation & copy	$1.25
Docketing cause	.20
Filing ten papers	1.50
Entering appearance	.15
Swearing three witnesses	.30
Issuing 1 subpœna for 2 witnesses	.40
Approving appeal bond	1.50
Assessing damages	.50
Entering final judgment	1.00
Taxing costs	.25
Transcript to civil appeals court	13.25
Total clerk's fees	$20.30

THE STATE OF TEXAS, }
County of Jack. }

I, J. A. Rouse, clerk of the district court in and for said county and State, hereby certify the above to be a correct account of the costs chargeable to the pl't'ff in the above entitled and numbered suit up to this date.

Given under my hand and seal of office at Jacksboro, this 21 day of December, A. D. 1901.

J. A. ROUSE,
[SEAL.] *Clerk District Court, Jack Co., Texas.*

Filed in the court of civil appeals at Fort Worth, Texas the 25th day of Dec. A. D. 1901.

W. C. STRONG, *Clerk.*

45 *Opinion of Court of Civ. Appeals.*

J. L. LAS TER, Appellant,
vs.
FIRST NATIONAL BANK OF JACKSBORO, Appellee. } No. 3919.

From district court of Jack county.

Opinion.

This suit was brought by appellant July 26, 1901, upon the Federal statute to recover from the bank twice the sum of $1526.80 usurious interest paid to it—$3053.60. The defense was a general denial, statute of limitation of two years, and that since the usury was paid the appellant had filed his petition in bankruptcy and been discharged and that he therefore had no right or interest in the claim. The case was tried by the court without a jury who rendered judgment for the bank, and hence this appeal.

The facts are substantially as follows: The appellant and one Maggard were partners in cattle raising, and on the 30th day of March, 1898, borrowed of the bank $4000.00 and executed their joint note with A. M. Lasater as surety for $4350 due November 15, 1898, with 10% interest after maturity. They also mortgaged their cattle to the bank as further security to said note. On November 22, 1898, the firm paid $390.90 on said note directing it to be applied to the interest due thereon, and on the same day borrowed $100 more which was added to the note, and after deducting the sum of $390.90 interest due renewed the same for $4450.00 dating it back to November 15, 1898. It was signed by the same parties as before and bore ten per cent. interest from maturity. On the 17th of August, 1899, the firm paid on said note $382.90 with no instructions how to apply it, and on the next day paid $167.50 more, instructing the bank to apply it to the payment of interest, and on the 17th day of November, 1899, the appellant paid $62.00 more
46 with no instructions how to apply it. In — same month of November the said Maggard sold all his interest in the firm to Lasater the latter assuming all the liabilities, but nothing was said about this claim against the bank, and appellant renewed the note for $4313.50 dating it back to November 16, 1899, payable

June 15, 1900, with interest at 10% after maturity. On December 6, 1899, appellant paid $22.50; on June 29, 1900 $15.00 with no instructions as to application of such payments. On the 15th day of October 1900, A. M. Lasater, the surety, bought all the mortgaged cattle of appellant and some others and agreed to assume and pay off the note in full consideration of said sale, and executed his note to the bank on the 17th day of said month taking up the appellant's note, and in June 1901 paid to the bank the sum of $4457.00 in full of said note and the bank delivered to appellant his note so taken up. The appellant's last named note was also secured by another mortgage given to the bank on all of the same cattle.

On November 19, 1900, appellant filed his petition in bankruptcy in the district court of the United States for the northern district of Texas, and E. H. Cottingham was appointed trustee, and appellant was duly discharged of all his debts on January 8, 1901, and the trustee was discharged of his trust on June 11, 1901. He returned no assets to his trustee—says he had none unless this claim for usury was one. Says he did not tell the trustee or his creditors about this claim for usury. After the note was paid by A. M. Lasater and the cattle gotten up, he contended that there were not as many cattle as were represented by appellant and this controversy was afterwards settled by appellant agreeing to pay him $1500 for the deficit,
47 and has paid him $500 by transferring him his interest in his grandmother's estate.

All the notes from first to last contain usury. The whole amount borrowed was $4100, the whole amount paid back was $5497.80, the whole time was two years, six months and 17 days. The highest legal rate of interest allowed by Texas law was ten per cent. per annum. The whole amount of interest paid was $1397.80—the whole amount of legal interest was $1038.05.

The facts as above stated are undisputed, and only questions of law are presented for solution.

The able counsel for appellee bank contend that appellant had no right to sue for the penalty denounced by the statute: (1) Because only the person paying the usurious interest or his legal representatives is allowed under the statute to sue for it, and that appellant is neither of these since the money was paid by the firm and the other member does not sue. (2) The last payment was made by A. M. Lasater who was jointly bound on the note and he does not sue. (3) Appellant's trustee in bankruptcy should bring the action, if maintainable at all, for the fund would be an asset of the bankrupt's estate and belong to the trustee for the use of appellant's creditors.

Section 5198 of the Revised Statutes of the United States, provides: "The taking, receiving reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal repre-

sentatives, may recover back, in an action in the nature of an action for debt, twice the amount of the interest thus paid from the
48 association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred.

The preceding section—5197—provides, among other things, that national banks may charge and receive on notes, bills, etc. interest at the rate allowed by the laws of the State where the bank is located, and no more.

The first question confronting us is: Has the remaining member of a partnership, who has purchased all the retiring member's interest in the firm and agreed to pay all the debts, the right to maintain this action?

The statute gives the right of action to "the person by whom it has been paid, or his legal representatives." A business co-partnership or firm is not, in law, considered a "person," and it cannot maintain an action, but must sue in the name of its individual members on contracts made in the firm name, or on other liabilities due to the firm. Ordinarily, the surviving member of a firm, where the other member has died, succeeds by operation of law to all the rights and liabilities existing in favor of or against the firm, and is entitled in his own name, as such survivor, to sue for and recover any debt or claim to which the firm was entitled prior to the dissolution. This, partly, because he was liable for all the debts of the firm before his partner died, and, of course, remains so afterwards, and had the right to use any of and all the partnership assets in discharge of its liabilities. The right of action to recover partnership debts and effects which existed in both partners before the death of the one by operation of law passes to, and survives in, the living one and so the right survives in him to sell and dispose of the partnership property and collect its debts to pay the part-
49 nership indebtedness. If Maggard in this case had died and left appellant as surviving partner, we think it quite clear that the latter could maintain this action in his own name as such survivor. He succeeds by operation of law to all the rights and liabilities of the firm for the purpose of winding up its business, and is entitled to represent the firm. If by the law he represents the firm he is its "legal representative."

But Maggard did not die out of the firm—he retired from it, and, by contract with appellant, transferred all his interest in the partnership property and assets to him, in consideration that he would pay all the debts of the firm. Now, if this claim against the bank was an asset of the firm, and the survivor could recover it in case of the death of his partner, the writer at least can see no reason why he may not recover it in case of the retirement of his partner. His duties and liabilities are the same in each case. He is bound to pay all the debts of the firm, and can be compelled by the retiring partner or by creditors to apply all the assets of the firm to that purpose, where he has agreed with his retiring partner to do so; and

why should not his right to collect the assets of the firm be co-extensive with his liabilities in the one case as it is in the other?

The terms "legal representative" have been held to apply to "all persons who, with respect to another's property, stand in his place and represent his interests, whether transferred to them by his act or by operation of law." Mutual Life Ins. Co. *v.* Armstrong, 117 U. S., 998,—L. Ed. Book 29, p. 999, citing N. Y. Life Co. *v.* Flack, 3 Md., 341. See, also, Bank *v.* Alvis, 91 Ky., 146; 15 S. W. Rep., 133; Louisville Trust Co. *v.* Ky. National Bank, 87 Fed. Rep., 143—s. c. 102 Fed. Rep., 442; Fidelity Ins. Co. *v.* Ryan, 58 S. W. Rep.,
50 *610*; Hammond *v.* Mason, 92 U. S. 724,—L. Ed. Book 23, 767; Ry. Co. *v.* Bryan, 8 Smedes & M. (Miss.) 275; Abb. Law Dict.; Rhemmer *v.* Lemben, 71 Ill., 91; Bradley *v.* Dells Lumber Co., 105 Wis., 246,—81 N. W. Rep., 394; O'Neale *v.* Caldwell, 3 Cranch (C. C.) 313.

In Taylor *v.* Sturgis, 5 Texas Ct. Rep., 140—68 S. W. Rep., 538, the court of civil appeals of the fifth district in an opinion by Chief Justice Rainey held that one who has a right of action for double the amount of usurious interest paid by him under article 3106, Revised Statutes of Texas, can assign the same so as to give to the assignee the right to maintain an action thereon.

The Texas statute is as follows: "If usurious interest, as defined by the preceding articles, shall hereafter be received or collected the person or persons paying the same, or their legal representatives, may by action of debt, instituted in any court of this State having jurisdiction thereof, within two years after such payment, recover from the person, firm or corporation receiving the same, double the amount of interest so received or collected." 2 Sayles Civil Statutes, art. 3106.

The learned chief justice puts the decision upon the ground that: "This statute gives a right of action to one paying usurious interest, and in case of his death such a right would become an asset of his estate, subject to administration," and therefore the character of claim which may be bought and sold. Citing Railway Company *v.* Freeman, 57 Texas, 156. In the latter case it is said that "when the injury affects the estate rather than the person * * * the right
51 of action could be bought and sold, such right of action, upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee as part of the asset, because it affects his estate and not his personal right."

Under a statute of Texas which prescribes that claims for damages for injuries not resulting in death, whether "to the health or to the reputation or to the person of the injured party" shall not abate by reason of his death, nor by reason of the death of the person against which such cause of action shall have accrued; but in case of the death of either or both such cause of action shall survive to and in favor of the "heirs and legal representatives" of such injured party, we held that the claim, being one which survived to the representatives of his estate, was assignable so as to vest an interest in his at-

torney to whom a half interest had been transferred. Ry. Company *v.* Miller, 53 S. W. Rep., 709.

The writer at least is inclined to the opinion that the appellant, as remaining partner, having purchased from his retiring partner all his interest in the partnership property and assets, agreeing to pay all the debts of the firm, is the "legal representative" of the firm which paid the usurious interest, and being such is entitled to maintain this action in his own name. But, however this may be, we have finally concluded though with some doubt and hesitation, that, by the terms used in the article it was the intention of Congress to vest in the person who paid the usurious interest the right to "recover back twice the amount of the interest thus paid;" and in order to show that this right was not intended to be limited to him only, as a purely personal right, the terms "legal representatives" were added as words of survivorship, so that, in case of the death of the person paying the usurious interest, the right of action should not die with him, but descend to his executors, administrators
52 and heirs, and thus to be classed as a claim belonging to his estate rather than to his person only.

If we are correct in this construction of the act, it follows that the claim, being one that will survive the death of the person in whom the right of action is vested, is one which, under the laws of Texas, belongs to his estate and consequently one that may be sold and bought like any other chose in action.

The payment made by A. M. Lasater, the surety, who purchased the mortgaged cattle from appellant, and in consideration thereof agreed to pay off the note to the bank, and in discharge thereof executed his own note, which was afterwards paid, was in law a payment by appellant in property and the same as payment in money. Taylor *v.* Sturgis, 5 Tex. Ct. Rep., 140; Hough *v.* Horsey, 36 Md., 184; Low *v.* Pritchard, 36 Vt., 183; Richardson *v.* Baker, 52 Vt. 617; Bank *v.* Bingham, 50 Vt. 105; Nelson *v.* Cooley, 20 Vt. 201; vol. 27 Am. & Eng. Enc. of Law, p. 960.

There is no merit in appellee's contention that because of appellant's bankruptcy he can not recover on this claim. His trustee, it seems would have been entitled to the fund as legal representative of the bankrupt (*In re* Kellogg, 113 Fed. Rep. 120; Herndon *v.* Davenport, 75 Texas, 462), though there are some authorities to the contrary. Bank *v.* Bingham, 50 Vt., 105; Nichols *v.* Bellows, 22 Vt. 581; Beals *v.* Lewis, (Ohio), 1 N. E. Rep., 641, but both the bankrupt and trustee had been discharged when this suit was filed. Only the person paying the usurious interest or his legal representative can maintain the action, the statute creating the right especially so provides, but, as stated, a trustee in bankruptcy, or, it
53 seems, a receiver appointed by a court are legal representatives within the meaning of the statute. Barber *v.* Bank, 12 N. E. Rep., 5. But the fund in this instance was never reduced to possession nor claimed by the trustee or creditors in right of the trustee, and it does not lie in the mouth of the usurer to say that ap-

pellant shall not now recover it. By knowingly violating this plain statute the bank became liable to him for twice the sum of interest so charged and received by it. Boerner *v.* Bank, 39 S. W. Rep., 285; Smith *v.* Chilton, *ib.*, 287; Colgin *v.* Bank, 40 S. W. Rep., 634; Hill *v.* Bank, 15 Fed. Rep., 432; Bank *v.* Karmany, 98 Pa. St., 65; Bank *v.* Bullong, 40 N. E. Rep., 413. This liability of the bank was not discharged by appellant's bankruptcy proceedings, nor has it been paid, and we see no reason why the appellant is not entitled to recover it, as title remained in him at the close of the bankruptcy proceedings. Herndon *v.* Davenport, 75 Texas, 462; Jones *v.* Pyron, 57 Texas, 43; Conner *v.* Express Co., 42 Ga., 37, same case, 5 Am. Rep., 543.

This brings us to the issue of limitation, and as to the first interest paid—$390.90—we think that appellant's right to recover on this payment was clearly barred by the article of the Federal statute quoted. The "usurious transaction occurred" in contemplation of the statute when the usurious interest was paid, which, in this instance, was November 22, 1898, more than two years before this suit was filed—July 26, 1901. National Bank *v.* Ragland, 181 U. S. 45—L. Ed. Book 45, 738.

This disposes of all the material questions of law arising in the case, and we conclude that the judgment must be reversed, and, as the facts are undisputed and the case was tried by the court without a jury, it becomes our duty to render the judgment here
54 which the court below should have rendered. After deducting the first payment of interest of $390.90, which was barred by limitation, from $1397.80, the whole amount of interest paid, we find that appellant paid on said debt $1006.90 usurious interest, the claim for which was not barred, and is consequently entitled to recover from the appellee bank twice the above sum—$2013.80. The clerk of this court is ordered to enter judgment accordingly, with interest at the rate of 6 per cent. per annum from September 6, 1901, until paid, and all costs.

Reversed and rendered.

SAM J. HUNTER,
Associate Justice.

Filed in court of civil appeals for second supreme judicial district of Texas, November 8, 1902.

W. C. STRONG, *Clerk.*

Judgment Court of Civil Appeals.

J. L. LASATER
vs.
FIRST NATIONAL BANK OF Jacksboro.

No. 3919. From District Court of Jack County, November 8, 1902. Opinion by Mr. Hunter, A. J.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was error in the judgment. It is therefore considered, adjudged and ordered that the judgment of the court below be reversed, and that such judgment be here rendered for the appellant as should have been rendered in the trial court.

It is accordingly ordered, adjudged and decreed by the court that the appellant John L. Lasater do have and recover of and from the appellee, The First National Bank of Jacksboro, the sum of two thousand and thirteen dollars and eighty cents ($2013.80) with interest on said sum at the rate of 6 per cent. per annum from the 6th day of September, 1901, until paid, together with all costs incurred in this behalf in this court and in the district court, for all of which execution may issue. And it is further ordered that this decision be certified below for observance.

55

Application for Rehearing.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth.

J. L. LASATER, Appellant,
vs.
FIRST NATIONAL BANK OF JACKSBORO, Appellee.

Appeal from the district court of Jack county.

Application for Rehearing.

Now comes the appellee, The First National Bank of Jacksboro, in the above styled and numbered cause, and moves the court to set aside the judgment heretofore rendered in this cause reversing and rendering the judgment of the court below, and to grant a rehearing and affirm the judgment of the court below for the following reasons, to wit:

First Assignment of Error.

The court erred in holding that appellant had the right to sue for this penalty merely because he had been a member of the firm that paid part of the usurious interest.

Statement.

The testimony shows that the firm paid $— as interest, (Tr. p. —, l. —) Maggard, the other partner, never assigned the right to sue for the penalty, (Tr. p. —, l. —).

Second Assignment of Error.

56 The court erred in holding that appellant, after assuming to pay the firm debt, could sue for and recover the entire penalty.

Statement.

Appellant and Maggard were equal partners and Maggard sold out to appellant, who assumed to pay all the indebtedness of the firm. (Tr. p. 22 l. 21 to l. 32 p. 33, and p. 36, ll. 12–29.) When Maggard sold to appellant he did not sell any right to sue for usury, (Tr. p. 23, ll. 16 to 23, and p. 36 l. 30 and p. 37, l. 6.) This firm was dissolved in the fall of 1899, (Tr. p. 23, l. 7, and p. 36, ll. 22–24.) The firm paid on Nov. 22, 1898, $390.90, as interest, (Tr. p. 24, ll. 8–13), and on Aug. 18, 1899, $167.50 on interest, (Tr. p. 25, ll. 2–10.) The partnership borrowed $4000.00 on Nov. 30, 1898, and gave the firm note for $4350.00, (Tr. p. 23, ll. 24–32.) Said note was renewed by the firm, at this time they borrowed $100.00 more and the note was dated Nov. 15, 1898, payable July 16, 1899, (Tr. p. 24 l. 14, to l. 10, p. 25.)

Third Assignment of Error.

The court erred in holding that the agreement between appellant and A. M. Lasater, who was a joint maker of the note, was a reception of a payment thereof by said appellee and *knowingly* received by it as a payment *from appellant*, when it knew nothing about A. M. Lasater paying the note for appellant, and was not a party to the agreement.

Statement.

A. M. Lasater was a joint maker of the note. The entire transaction between appellant and A. M. Lasater shows that the latter was simply trying to get what he could out of appellant lest he should have to pay the note as surety and thus lose the entire amount so paid. (Tr. p. 38, ll. 7–12) His testimony shows
57 that he did not consider that he was paying this note for appellant, (Tr. p. 37, l. 21) The property that he turned over to A. M. Lasater was not sufficient to satisfy the note by $1300.00 or

$1500.00, (Tr. p. 35, ll. 28 & 32, and p. 39, l. 27.) It took this much of A. M. Lasater's money to pay off this note. After the dissolution of the firm, appellant executed his note for $4313.50 on Nov. 16, 1899, payable June 15, 1900, and was signed by A. M. Lasater also, (Tr. p. 25, ll. 11–20.) This note was never paid by appellant but was paid by A. M. Lasater under the circumstances detailed above. Said firm got $4100.00 in money, and at the time that appellant assumed this note he made his note as above shown for $4313.50. This latter amount then represented the individual indebtedness due by appellant on said note. Whatever had been paid before that was paid by the firm out of the firm's property. This latter note was paid by A. M. Lasater and not by appellant.

Fourth Assignment of Error.

The court erred in holding that appellant, though discharged in bankruptcy, can sue for this penalty, when the evidence shows that the bankruptcy proceedings can be opened within two years, (which time has not yet elapsed), and this penalty reduced to an asset of said estate.

Statement.

The appellant was discharged in bankruptcy on Jan'y 7, 1901, (Tr. p. 27, l. 12), and the proceedings were closed June 11, 1901, (Tr. p. 32, l. 4.)

Appellee represents that Howard Martin and Wayne H. Lasater, who reside respectively in Parker and Palo Pinto counties, Texas, are the attorneys of record of the appellant.

58 Wherefore appellee prays that notice according to law be given of this application, and that, on hearing hereof, the judgment reversing and rendering the cause heretofore rendered herein be set aside and rehearing granted, and that further proceedings be had herein as prayed for in appellee's original brief.

Respectfully submitted,

THOS. D. SPORER &
E. W. NICHOLSON,
Attorneys for the First National Bank of Jacksboro, Appellee.

Filed in court of civil appeals for the second supreme judicial district of Texas, November 21, 1902.

W. C. STRONG, *Clerk.*

Certified Question to Supreme Court of Texas.

J. L. LASATER, Appellant,
vs.
FIRST NATIONAL BANK OF JACKSBORO, Appellee. } No. 3919.

Certified question to the supreme court.

To the honorable supreme court:

The above styled and numbered cause on appeal from the district court of Jack county, Texas, is now duly pending before us, upon motion for rehearing upon the facts recited in the opinion of Justice Hunter herewith submitted and which we briefly restate as follows: The suit was brought by appellant July 26, 1901, upon the Federal and State statutes to recover from the bank twice the sum of $1526.80 usurious interest paid to it, $3053.60. The defedse was a general denial, statute of limitation of two years, and that since the usury was paid the appellant had filed his petition in bankruptcy and been discharged, and that he therefore had no right or
59 interest in the claim. The case was tried by the court without a jury who rendered judgment for the bank. The facts are substantially as follows:

The appellant and one Maggard were partners in cattle raising, and on the 30th day of March, 1898, borrowed of the bank $4000, and executed their joint note with A. M. Lasater for $4350, due November 15, 1898, with 10 % interest after maturity. On November 22, 1898, the firm paid $390.90 on said note directing it to be applied to the interest due thereon, and on the same day borrowed $100 more, which was added to the note, and after deducting the sum of $390.90, interest due, renewed the same for $4450, dating it back to November 15, 1898. It was signed by the same parties as before and bore ten per cent. interest from maturity. On the 17th day of August, 1899, the firm paid on said note $382.90, with no instructions how to apply it, and on the next day paid $167.50 more, instructing the bank to apply it to the payment of the interest, and on the 17th day of November, 1899, the appellant paid $62 more with no instructions how to apply it. In same month of November the said Maggard sold all his interest in the firm to J. L. Lasater, the latter assuming all the liabilities but nothing was said about this claim against the bank, and appellant with A. M. Lasater renewed the note for $4313.50 dateing it back to November 16, 1899, payable June 15, 1900, with interest at 10 per cent. after maturity. On December 6, 1899 appellant paid $22.50; on June 29, 1900, $15, with no instructions as to the applications of said payments. On the 15th day of October, 1900, A. M. Lasater, the surety, bought all of the mortgaged cattle of appellant and some others, and agreed to as-

sume and pay off the note in full in full consideration of said
60 sale, and executed his note to the bank on the 17th day of said month, taking up the appellant's note, and in June 1901, paid to the bank the sum of $4457, in full of said note, and the bank delivered to appellant his note so taken up. The last named note was also secured by another mortgage given to the bank on all of the same cattle. A. M. Lasater was a party to the original and all renewal notes made to the bank, he being as to the bank a principal thereon, but as between himself and the other signers a surety only on all but the last note, which was his obligation alone.

On November 19, 1900, appellant filed his application in bankruptcy in the district court of the United States, for the northern district of Texas, and E. H. Cottingham was appointed trustee, and appellant was duly discharged of all his debts on January 7, 1901, and the trustee was discharged of his trust on June 11, 1901. He returned no assets to his trustee, said he had none unless this claim for usury was one; says he did not tell the trustee or his creditors about this claim for usury. After the note was paid by A. M. Lasater and the cattle gathered he contended that there were not as many cattle as were represented by appellant, and the appellant agreed to pay him $1500 for the deficit, and has paid him $500 by transferring him his interest in his grandmother's estate.

Upon the foregoing facts we deem it advisable to certify to your honors for decision the following questions: 1st. Was the appellant's discharge in baukruptcy a bar to his recovery in this suit? 2nd. Was J. L. Lasater on the facts stated entitled to recover from the bank the penalty denounced by the statute? In other words, was
J. L. Lasater, entitled, either as an assignee or as surviving
61 partner, to recover the penalty sued for as to usurious interest paid during the continuance of the partnership? And was J. L. Lasater, by reason of his having assumed the payment of this debt due the bank when he purchased the interest of his retiring partner Maggard, precluded from recovering or limited in his recovery to one half the sum he would otherwise be entitled to? And is the payment made by A. M. Lasater to be regarded as a payment by J. L. Lasater?

Respectfully submitted,

T. H. CONNER,
Chief Justice.

Opinion of Supreme Court on Certified Questions.

J. L. LASATER, Appellant,
vs.
FIRST NATIONAL BANK OF JACKSBORO, Appellee. } No. 1184.

From Jack county—Certified questions from 2nd dist.

This case is presented upon the following certificate from the court of civil appeals for the second district.

"This suit was brought by appellant on July 26, 1901, upon the Federal and State statutes to recover from the bank twice the sum of $1526.80 usurious interest paid to it, $3053.60. The defense was a general denial, statute of limitation of two years, and that since the usury was paid the appellant had filed his petition in bankruptcy and been discharged, and that he therefore had no right or interest in the claim. The case was tried by the court without a jury who rendered a judgment for the bank. The facts are substantially as follows:

'The appellant and one Maggard were partners in cattle
62 raising, and on the 30th day of March, 1898, borrowed of the bank $4000, and executed their joint note with A. M. Lasater for $4350, due November 15, 1898, with 10 % interest after maturity. On November 22, 1898, the firm paid $390.90 on said note directing it to be applied to the interest due thereon, and on the same day borrowed $100 more, which was added to the note, and after deducting the sum of $390.90, interest due, renewed the same for $4450, dating it back to November 15, 1898. It was signed by the same parties as before and bore ten per cent. interest from maturity. On the 17th day of August, 1899, the firm paid on said note $382.90, with no instructions how to apply it, and on the next day paid $167.50 more, instructing the bank to apply it to the payment of the interest, and on the 17th day of November, 1899, the appellant paid $62 more with no instructions how to apply it. In same month of November the said Maggard sold all his interest in the firm to J. L. Lasater, the latter assuming all the liabilities but nothing was said about this claim against the bank, and appellant with A. M. Lasater renewed the note for $4313.50 dating it back to November 16, 1899, payable June 15, 1900, with interest at ten per cent. after maturity. On December 6, 1899, appellant paid $22.50; on June 29, 1900, $15, with no instructions as to the application of said payments. On the 15th day of October, 1900, A. M. Lasater the surety, bought all the mortgaged cattle of appellant and some others, and agreed to assume and pay off the note in full consideration of said sale, and executed his note to the bank on the 17th day of said month, taking up the appellant's note, and in June 1901, paid to the bank the sum of $4457, in

full of said note, and the bank delivered to appellant his note so taken up. The last named note was also secured by another
63 mortgage given to the bank on all of the same cattle. A. M. Lasater was a party to the original and all renewal notes made to the bank, he being as to the bank a principal thereon, but as between himself and the other signers a surety only on all but the last note, which was his obligation alone.

On November 19, 1900, appellant filed his petition for bankruptcy in the district court of the United States, for the northern district of Texas, and E. H. Cottingham was appointed trustee, and appellant was duly discharged of all his debts on January 7, 1901, and the trustee was discharged of his trust on June 11, 1901. He returned no assets to his trustee, said he had none unless this claim for usury was one; after the note was paid by A. M. Lasater and the cattle gathered he contended that there was not as many cattle as were represented by appellant, and the appellant agreed to pay him $1500 for the deficit, and has paid him $500 by transferring him his interest in his grandmother's estate.

Upon the foregoing facts we deem it advisable to certify to your honors for decision the following questions: 1st. Was the appellant's discharge in bankruptcy a bar to his recovery in this suit? 2nd. Was J. L. Lasater on the facts stated entitled to recover from the bank the penalty denounced by statute? In other words, was J. L. Lasater entitled, either as an assignee or as surviving partner, to recover the penalty sued for as to usurious interest paid during the continuance of the partnership? And was J. L. Lasater, by reason of his having assumed the payment of this debt due the bank when he purchased the interest of his retiring partner Maggard, precluded from recovering or limited in his recovery to one-half the sum he would otherwise be entitled to? And is the payment made by
64 A. M. Lasater to be regarded as a payment by J. L. Lasater?"

All of the questions had been decided by the court of civil appeals favorably to the plaintiffs and were certified upon motion for rehearing. We have examined the opinion of the court and we think it correctly decided the several points presented. We shall therefore content ourselves with briefly stating our conclusions and citing some authorities in addition to those referred to in the opinion.

I. The weight of authority sustains the proposition that, when such a cause of action as that asserted has accrued, it will, upon bankruptcy of the owner, pass to the trustee in bankruptcy. (Monongehela National Bank *vs.* Overbott, 96 P. St. 327; Gray *v.* Bennett, 3 Metc., 522; Tiffany *v.* Boatman's etc. Assn., 18 Wall.; Tamplin *v.* Wentworth, 99 Mass., 63; Louisville Trust Co. *v.* Kentucky Nat'l Bank, 87 Fed. 143; Wheelock *v.* Lee, 64 N. Y., 242; Spicer *v.* Jarrett, 2 Baxt. (Tenn.); Moore *v.* Jones, 23 Vt., 739; National Bank *v.* Trimble, 40 Ohio St. 629; Crocker *v.* Bank of Chitopa, 4 Dillon, 358.) The authorities cited by the court of civil appeals sustain the proposition that after the close of the administration of the bankrupt's estate and the discharge of the trustee, unadministered assets

may be recovered by the bankrupt. The decisions of the Supreme Court of the United States make somewhat doubtful the application of the proposition to a case like this where the trustee had no knowledge of the existence of the asset, and where the suit is brought so recently after the close of the bankruptcy proceeding that it may be reopened and further administration had. (Sessions *v.* Romadka, 145 U. S., 29; Sparhawk *v.* Yerkes, 142 U. S., 1; Dushane *v.* Beall, 161 U. S., 513.) The bankrupt law does not contemplate that any assets shall be left unadministered; but it sometimes happens that there are such, and, when neither the creditors nor the trus-
65 tee asserts right to them, it is, we think, proper to regard them at least as against a wrongdoer, as belonging to the bankrupt. This may often be found necessary, as it seems to be in this case, to prevent destruction of the property right, and a judgment thus preserving the right may be as easily reached by those entitled to do so by proper proceedings as the cause of action itself. If such persons do not choose to proceed, no good reason is seen why the bankrupt himself should not be allowed to recover. (Lancey *v.* Fass, 88 Me., 218.)

II. That the interest of plaintiff's former partner in any cause of action which accrued to the firm passed by assignment to plaintiff is, we think, also true. Most of the authorities which hold that such claims pass to trustees in bankruptcy, assignees for creditors, etc., are based upon the proposition that they are assignable, although some of them sold such successors to be "legal representatives" in the sense of statutes giving the action, an interpretation to which we are not now prepared to assent. It is true, however, as argued by Mr. Justice Hunter, that plaintiff has succeeded to the assets and liabilities of the partnership as fully as assignees succeed to those of bankrupts and insolvents, and, if the latter are to be regarded as legal representatives, the former can as well be held to be such. We prefer to hold, that the statute which gives the action to the person paying the usury or "his legal representatives" evinces the intent that it is not to be regarded as strictly a personal right, and, hence, that it may be assigned.

III. The authorities cited by the court of civil appeals support its decision that the payment by A. M. Lasater of the usurious interest which the contract bound plaintiff to pay and the payment of which he procured by the conveyance of the property, is to be treated
66 as a payment made by him.

The assumption by plaintiff of the debts of the partnership did not change the relation of either partner to the bank. They both continued liable for the debt as before. There was imposed on plaintiff no increased obligation to the bank. As between himself and his retiring copartner he became primarily liable, but only to the extent that the firm was liable. This was not an agreement on his part to pay for Maggard usurious interest, and hence it can not be held that as part of the consideration for Maggard's interest in the assets plaintiff agreed to pay the debt, usury and all. Their

agreement does not affect plaintiff's right to recover (Holland *vs.* Chambers, 22 Ga., 193).

F. A. WILLIAMS,
Associate Justice.

Opinion delivered March 16th, 1903.
Filed in court of civil appeals for second supreme judicial district of Texas, April 3, 1903.

W. C. STRONG, *Clerk.*

Order of Court of Civil Appeals Overruling Motion for Rehearing.

J. L. LASATER
vs.
FIRST NATIONAL BANK OF JACKSBORO. } 3788–3919. April 4, 1903.

This day came on to be heard the motion by appellee for rehearing in this cause, which, having been heard and considered by the court, is overruled.

67 *Bill of Costs in Supreme Court on Certified Questions.*

J. L. LASATER
vs.
FIRST NAT'L BANK OF JACKSBORO. } No. 1184. Jack County. Certified Copy Bill of Costs in Supreme Court.

Filing record	$ .50
Docketing cause	.50
Entering appearances	1.00
Filing briefs and arguments	.60
Filing extra papers	.60
Entering judgment	1.00
Taxing costs	.50
Certified copy of bill of costs	1.00
Recording opinion	2.50
Certified copy of opinion	2.50
Entering orders	1.00
Notices to counsel	2.00
Cert. copy of judg't to C. C. A.	1.00
Total	$14.70

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and the seal of said court, at Austin, this the 1st day of April, 1903.

[SEAL.] F. T. CONNERLY, *Clerk.*

Filed in court of civil appeals for second supreme judicial district of Texas, April 3, 1903.

W. C. STRONG, *Clerk.*

68 *Application for Writ of Error to Supreme Court of Texas.*

In the Supreme Court of the State of Texas.

THE FIRST NATIONAL BANK OF JACKSBORO, Plaintiff in Error,
vs.
J. L. LASATER, Defendant in Error.

Appeal from the district court of Jack county, Texas.

Judgment reversed and rendered by the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth, and appellee's motion for rehearing overruled.

Application for writ of error.

To the honorable supreme court of the State of Texas:

Your petitioner, The First National Bank of Jacksboro, respectfully represents that, in the above styled and numbered cause, on the 8th day of November, A. D. 1902, the court of civil appeals, at Fort Worth, reversed the judgment of the court below and rendered judgment for the defendant in error and thereafter, in due time, your petitioner filed its application for a rehearing in said court of civil appeals, which application was thereafter by the said court overruled and denied.

The defendant in error instituted this suit on July 26, 1901, against the First National Bank of Jacksboro to recover the penalty prescribed by the Federal statutes for knowingly charging and receiving usurious interest, and the petition charges, in substance, as follows:

That on March 30, 1898, the defendant in error and one W. M. Maggard formed a partnership as traders in cattle business, and to do business under the firm name of W. M. Maggard Special. That they were to share equally in the profits and losses. That at the time of said agreement, their capital consisted of $4000.00 which the said firm borrowed from said bank. That said partnership was dissolved on May 10, 1899, by mutual agreement. That by
69 the terms of said dissolution the defendant in error was to take in his own right all the property, rights and assets of whatsoever kind belonging to said firm; and he assumed all the indebtedness due by the said firm. That said money borrowed from said bank by the said firm, W. M. Maggard Special, was evidenced by a note for $4350.00 and it was alleged that the same was signed by W. M. Maggard and J. L. Lasater, as principals, and A.

M. Lasater as surety, and was payable on Nov. 15, 1898, with interest from maturity at the rate of ten per cent. per annum. That $350.00 of said note was for interest on said $4000.00 from March 30, 1898, until Nov. 15, 1898.

That on Nov. 22, 1898, the said firm paid said bank $390.00, and executed a renewal note for $4450.00, dated Nov. 15, 1898, and payable July 15, 1899, with interest from maturity at the rate of ten per cent. per annum, and it was alleged that the same was signed by J. L. Lasater and W. M. Maggard, as principals, and A. M. Lasater as surety.

That on August 5, 1899, the said firm paid $167.50 on said last note, and on August 17, 1899, the said firm again paid $382.90, and on Nov. 17, 1899, they paid $62.00.

That on Nov. 16, 1899, after the dissolution of said firm, the said defendant in error took up this last described note and executed a renewal note in its stead dated Nov. 16, 1899, for $4313.50, payable June 15, 1900, with ten per cent. interest from maturity, and it was alleged that the same was signed by J. L. Lasater, defendant in error, as principal, and A. M. Lasater as surety. On this note the defendant in error paid $22.50 on Dec. 16, 1899, and $15.00 on June 29, 1900.

Defendant in error further alleges that he paid off the last described note of $4313.50 by paying and causing to be paid to
70 said bank the sum of $4486.00 on Oct. 17, 1900. That all the money paid in except the sum of $4000.00 was for usurious interest, and that the said bank charged and received $1526.80 as interest on said $4000.00 from March 13, 1898, to Oct. 17, 1900, which amount is in excess of ten per cent. per annum.

The plaintiff in error answered by general demurrer and special exceptions to the said petition, because:

1st. The defendant in error sought to recover a penalty for usurious interest paid by his partner Maggard.

2nd. The petition shows that $390.00, having been paid on Nov. 22, 1898, is barred by limitation.

4th. Said petition alleges that said partnership paid, on Nov. 22, 1898, $390.90, and on August 5, 1899, $167.50, and on Aug. 17, 1899, $382.90, and on Nov. 17, 1899, 62.00 and that the defendant in error can not recover for his interest in the interest paid on account of usurious interest.

And the plaintiff in error further answered by general denial, and also by special answer alleging:

1st. That since the usury was paid the defendant in error had filed his petition in bankruptcy, and had received his discharge. That E. H. Cottingham had been appointed trustee of his estate, and that said Lasater no longer had any interest in, or claim to, said penalty, as the same had vested in this said trustee, and that he alone was entitled to sue for the same for the use and benefit of the creditors of said Lasater.

2nd. That on the dissolution of said partnership the said M-ggard

did not sell or assign to the defendant in error any right to the said penalty.

3rd. That he had paid no usurious interest to the said bank whatever

71 4th. The bank denied that the defendant in error paid off said note to the said bank, in any manner. That said money was borrowed to be invested in cattle, and was so invested, and a chattel mortgage was given on the cattle to secure the said bank. That said firm was dissolved and Maggard transferred all his interest in said cattle to his co-partner Lasater, but the bank denied that Maggard assigned to the defendant in error any interest in, or right to recover, the said penalty.

That thereafter, prior to the filing of the said petition for a discharge in bankruptcy, by the defendant in error, he sold *the* delivered all of said cattle to A. M. Lasater, in consideration that the said A. M. Lasater should pay off and discharge said note, but there was no understanding that the defendant in error reserved the right to sue for and recover the said penalty. That by reason thereof he can not recover the said penalty.

The defendant in error filed his first supplemental petition, demurring generally to the answer filed therein, and specially excepting to that portion which set up his discharge in bankruptcy, for the reason that the same is no defense to the cause of action; and among other things alleged that he sold said cattle to A. M. Lasater under an agreement that the said Lasater was to pay said indebtedness to said bank; and that A. M. Lasater did make the said payment to the said bank, and that he paid the said note not for himself but for the defendant in error.

To this, the plaintiff in error, among other things, replied by special exception that the said first supplemental petition of the defendant in error shows that the defendant in error had parted with all interest and right in the said note to A. M. Lasater. That he himself made no payment of usurious interest on said

72 note; and the plaintiff in error also plead the statute of limitation to the payment of $350.00 made on March 30, 1898, and to the payment of $390.90 made on Nov. 22, 1898.

The court below overruled all the demurrers of plaintiff in error and rendered judgment in its favor; to this the defendant in error excepted and appealed, and the court of civil appeals reversed the judgment of the court below, and rendered judgment in his favor; holding;

(1.) That the defendant in error had the right to sue for the penalty both as assignee and as the legal representative of the firm of W. M. Maggard Special.

(2.) That the payment made by A. M. Lasater, who was jointly bound, on the note and does not sue, was a payment made by the defendant in error because he had bought the said cattle from the defendant in error, and assumed the payment of the said note, which was secured by a deed of trust on said cattle.

(3.) That there was no merit in the contention that because of the appellant's discharge in bankruptcy he can not recover on this claim.

The said court of civil appeals held, however, that the said firm and the defendant in error had borrowed from the said bank the sum of $4100.00, and that the payment of $390.90 on Nov. 22, 1898, was barred.

The evidence herein shows that the partnership was dissolved in the fall of 1899, and not on May 10, 1899, as alleged in the petition of the plaintiff in error, but there was nothing said about the assignment of the penalty to the defendant in error. (Tr. p. 23, ll. 7 to 23. and p. 36, l. 21 to l. 6 p. 37.)

That the following payments of interest *was* made on said note by said firm, viz.:

73 On Nov. 22, 1898, $390.90; on Aug. 18, 1899, $167.50 (Tr. p. 24 ll. 9 to 13. p. 25, ll. 2 to 6).

The following payments were made generally and not as interest by the firm, viz:

On August 17, 1899, $382.90, and on Nov. 17, 1899, $62.50. (Tr. p. 24 ll. 17 to 32 and p. 25 ll. 7 to 10.)

That after the firm's dissolution J. L. Lasater, defendant in error, paid generally on said note, viz:

On Dec. 6, 1899, $22.50, and on June 29, 1900, $15.00. (Tr. p. 25, ll. 11 to 14 and ll. 22 to 29.)

It was also shown that A. M. Lasater bought these cattle and assumed the payment of said note, on Oct. 15, 1900. (Tr. p. 33, ll. 10–30, and p. 38 ll. 23–27.)

A. M. Lasater was a principal on these notes and not a surety. (Tr. p. 26, ll. 21–26, p. 33, ll. 2–4. p. 37, ll. 17–22.)

The mortgage was given really to secure A. M. Lasater. (Tr. p. 37 ll. 30 to 32.)

A. M. Lasater's testimony shows that he was paying the note for himself. (Tr. p. 38, ll. 4–11. p. 39, ll. 2–22. p. 39 l. 31 to l. 2 p. 40.)

The defendant in error filed his voluntary application for discharge in bankruptcy on Nov. 19, 1900, and E. H. Cottingham was appointed trustee of his estate, and he was discharged on Jan'y 7, 1901. (Tr. p. 27, ll. 1–14.)

The trustee reported that after due search he was unable to find any property belonging to the estate other than exemptions, and that he verily believed there was none such. (Tr. p. 29, ll. 20–32) The trustee was discharged June 11, 1901.

The testimony of the defendant in error was in accordance with the proceedings in bankruptcy. (Tr. p. 34, l. 23 to l. 15 p. 35.)

He also testified that after he was discharged in bankruptcy
74 that he changed his mind about suing for this penalty, as he concluded that he needed the money in his business, nor did he say anything about it. (Tr. p. 36, ll. 1–10. Tr. p. 35, ll. 2–15.)

His estate did not pay anything on his indebtedness.

Your petitioner now applies to the supreme court for a writ of error to the end that said court may review the said cause and the action of the court of civil appeals therein, and correct such action, and as reasons and grounds for the granting of such writ of error, your petitioner assigns the following errors committed by the court of civil appeals in reversing said judgment, and in refusing a rehearing, to wit:

First. The court erred in holding that the appellant had the right to sue for his penalty merely because he had been a member of the firm that paid part of the usurious interest because the penalty is not assignable, and one member of a firm can not sue to recover a penalty for usurious interest paid by the firm.

Statement.

The testimony shows that the firm paid as usurious interest the sum of $390.90 on Nov. 22, 1898. (Tr. p. 24, ll. 9–13), and on Aug. 18, 1899, $167.50, (Tr. p. 25, ll. 2–6)

Maggard, the other partner, never assigned the right to sue for the penalty. (Tr. p. 23, ll. 16–23. p. 36, l. 30 to l. 8, p. 37) Maggard says: "If there was any such right in me, it still belongs to me."

Authorities.

As to the non-assignability of the penalty see:

Pardoe *v.* Iowa State National Bank, 106 Iowa, 345, 76 N. W., 800.

Lloyd *v.* First Nat. Bank, 5 Kan. App., 512, 47 Pac. 575.

75 Partners are jointly liable for the indebtedness of the firm and so in effect Maggard and Lasater were joint makers of the note. Wiggins *v.* Blackshear, 86 T. 666. Moore *v.* Williams, 62 S. W., 981.

A joint maker of a note can not sue for the recovery of the penalty for usury paid by another maker. (Concordia First N. Bk. *vs.* Rowley, 52 Kan., 394; Timberlake *v.* First N. Bk., 43 Fed. Rep., 231. Webb on Usury, para. 530.)

The Federal statute is penal and must be strictly construed.

First Nat. Bk. Charlotte, N. C., *v.* Morgan, 33 L. Ed. U. S. Rep., 282; Barnet *v.* Muncie Nat. Bk. 25 L. Ed. U. S. Rep. 212; Tiffany *v.* Nat. Bk., 21 L. Ed., U. S. Rep. 862; Wheeler *v.* Union Nat. Bk., 24 L. Ed., U. S. Rep., 833; Webb on Usury, para. 830, 831; Wright *v.* First Nat. Bk. 244 Fed. Case 1',076.)

The primary and ordinary meaning of legal representative is executors and administrators, and must be so construed in the absence

of anything to show contrary intent. 1' Am. & Eng. Ency. 1, 2nd ed. p. 813. Briggs *v.* Walker, *et al.*, 171 U. S. 466.

Is not a construction of this statute more in consonance with the rule applicable to penal statutes which confines these terms to a relation established by law rather than to a contractual one. Lewisville Trust Co. *v.* Ky. Nat'l Bk., 102 Fed. Reporter, 443. Osborne *v.* Athens Nat'l Bk., 175 Pa. St., 494.

Why should this case be given a broader interpretation than ordinarily?

The courts have always held that penal statutes are not entitled to any latitude of construction as against parties subject to its operation. De La Garza *vs.* Booth, 38 T. 483. Orton *v.* Engle-
76 dow, 8 T. 207; Hays *v.* Stewart, 8 T. 358, Rice *v.* Lemmons, 16 T. 593. State *v.* Williams, 8 T. 258

Where the penal clause is less comprehensive than the body of the act, the court will not extend the penalty to classes of persons or things not embraced within it, even where there is a manifest omission or oversight. 23 Am. & Eng. Ency. L. 382.

All statutes are to be construed strictly which encroach on property rights or work a forfeiture. *Ibid.* p. 383. And so it has been held universally by our courts in construing penal statutes. In suits on liquor dealers' bonds, State *v.* Vinson, 23 S. W., 808. To recover penalty for overcharge of freight, Schloss *v.* A. T. & S. F. Ry. Co. 85 T. 604. For failure by foreign corporation to comply with the statute of 1899. Keating &c. *v.* Fav. Carriage Co., 35 S. W., 418.

This court has held that our usury statute is penal and that "it devolves upon the plaintiff suing to recover a penalty thereunder to bring himself strictly within the terms of the statute. Whitlow *v.* Colwell 40 S. W. 642.

Is not the definition of legal representatives given by Judge Stayton in Newton *v.* Newton 77 T. 507, the proper one.

The Texas case of Taylor *v.* Sturges, 68 S. W., 538, we submit: 1st. It does not construe the U. S. statute; 2nd. It is contrary to the construction given the Federal statutes by other courts; and 3rd. It violates the rule of strict construction applicable to penal statutes as heretofore insisted upon.

Second Assignment of Error.

The court erred in holding that appellant, after assuming to pay the firm debt, could sue for and recover the entire penalty.

77 *Statement.*

Appellant and Maggard were equal partners and Maggard sold out to appellant, who assumed to pay all the indebtedness of the firm. (Tr. p. 22; l. 21 to l. 32 p. 23, and p. 36 ll. 12–29) When

Maggard sold to defendant in error he did not sell any right to sue for usury. (Tr. p. 23 ll. 16–23 and p. 36 l. 30, and p. 37 l. 6) This firm was dissolved in the fall of 1899, (Tr. p. 23, l. 7 and p. 36 ll. 22–24) The firm paid on Nov. 22, 1898, $390.90 as interest (Tr. p. 24, ll. 8–13), and on Aug. 18, 1899, $167.50 on interest, (Tr. p. 25, ll. 2–10). The partnership borrowed $4,000.00 on Nov. 30, 1898, and gave the firm note for $4,350.00, (Tr. p. 23, ll. 24–32). Said note was renewed by the firm, at this time they borrowed $100.00 more and the note was dated Nov. 15, 1898, payable July 16, 1899, (Tr. p. 24, l. 14 to l. 10 p. 25).

Authorities.

Farmers & Merchants Sav. Co. *v.* Bozore, 54 S. W., 339.
Matthews *v.* Paine, 14 S. W. 463.

A party who purchases property, assuming usurious indebtedness, cannot plead usury; *a fortiori*, should not be allowed to recover the penalty.

Vaughan *v.* Mutual Bldg. Ass'n, 36 S. W., 1013, and cases cited. 27 Am. & Eng. Ency. of Law, 1st ed. pp. 952 and 953, and the authorities cited in note 1. Webb on Usury, para. 372, and para. 374.

Third Assignment of Error.

The court erred in holding that the agreement between appellant and A. M. Lasater, who was a joint maker of the note, was a reception of a payment thereof by said bank and *knowingly* received by it as a payment from appellant, when it knew nothing about A. M. Lasater paying the note for defendant in error, and was not a party to the agreement.

78 *Statement.*

A. M. Lasater was a joint maker of the note. The entire transaction between defendant in error and A. M. Lasater shows that the latter was simply trying to get what he could out of defendant in error lest he should have to pay the note as surety and thus lose the entire amount so paid. (Tr. p. 38, ll. 7–12) His testimony shows that he did not consider that he was paying this note for defendant in error, (Tr. p. 37, l. 21) The property that defendant in error turned over to A. M. Lasater was not sufficient to satisfy the note by $1300.00 or $1,500*0*.00, (Tr. p. 36, ll. 28 & 32, and p. 39, l. 27). It took this much of A. M. Lasater's money to pay off this note. After the dissolution of the firm, defendant in error executed his note for $4,313.50 on Nov. 16, 1899, payable June 15, 1900, and was signed by A. M. Lasater also. (Tr. p. 25, ll. 11–20.)

This note was never paid by the defendant in error but was paid by A. M. Lasater under the circumstances detailed above. Said firm got $4,100.00 in money, and at the time defendant in error assumed this note he made his note as above shown for $4313.50. This latter amount then represented the individual indebtedness due by the defendant in error. Whatever had been paid before that was paid by the firm out of the firm's property. This latter note was paid by A. M. Lasater and not by the defendant in error. The mortgage was really given for A. M. Lasater's benefit. (Tr. p. 37, ll. 21–32.)

Authorities.

Lazear *v.* Nat'l Union Bk. of Baltimore, 2 Nat'l Bk. Cases, 261; U. S. R. S. para. 5189, says: "*The person by whom it has been paid*, or his legal representatives, may recover back, &c." Webb on Usury, para. 530.

Payment is the discharge in money of a sum due.

18 Amer. & Eng. Ency. of Law, 1st ed., 149, 150 and notes.

79 2nd Bouvier's Law Dictionary, last ed., 635.

This statute does not contemplate a payment in anything but money; and only he who makes a monied payment can recover the penalty. A. M. Lasater, who was a joint maker could sue.

One joint maker cannot recover the penalty for the payment by another joint maker. Timberlake *v.* First Nat. Bank, 43 Fed. 231. First Nat. Bank *v.* Rowley, 52 Kan. 394, 34 Pac. 1049.

We insist that no latitude of construction can be given this statute so as to make the word "payment" include such a transaction as was had between the def't in error and A. M. Lasater.

It is not a question as to whether the relationship between the bank and the partners remain the same.

Maggard and the defendant in error agreed to pay usurious interest; and when the partnership was dissolved he assumed to pay Maggard's portion of the usurious interest, in assuming to pay the indebtedness of the firm. We cannot escape the fact that the obligation to the bank was joint in law. Argue as we may, this is their legal status as to the indebtedness. We contend that after having sold out his interest in the cattle he had nothing whatever to do with this matter, and could not sue for the penalty. Scott *v.* Williams, 62 Am. St. Rep., 340.

Fourth Assignment of Error.

The court erred in holding that the defendant in error, though discharged in bankruptcy, can sue for this penalty, when the evidence shows that the bankruptcy proceedings can be reopened within two years, (which time has not yet elapsed,) and this penalty reduced to an asset of said estate.

Statement.

80 The defendant in error filed his voluntary application for discharge in bankruptcy on Nov. 19, 1900, and E. H. Cottingham was appointed trustee of his estate, and he was discharged Jan'y 7, 1901, (Tr. p. 27, ll. 1–14). The trustee reported that after due search he was unable to find any property belonging to the estate other than exemptions, and that he verily believed there was none such. (Tr. p. 29, ll. 20–32.) The trustee was discharged June 11, 1901. The testimony of the defendant in error was in accordance with the proceedings in bankruptcy. (Tr. p. 34, l. 23 to l. 15 p. 35) He also testified that after he was discharged in bankruptcy that he changed his mind about suing for this penalty, as he concluded that he needed the money in his business, nor did he say anything about it. (Tr. p. 36, ll. 1–10. Tr. p. 35, ll. 2–15.)

Authorities.

Monongahola Nat. Bk. *v.* Overholt, 3 N. B. Cas. 735, 96 Penn. St. 327. Wheelock *v.* Lee, 64 N. Y. 242. Schermerhorn *v.* Talman *et al.*, 14 N. Y. 94.

Judge Williams says that where the assets are left unadministered it is proper to regard them, at least as against a wrong doer, as belonging to the bankrupt. Is not this bankrupt as great a wrong doer as the bank, by deceiving the trustee and the court and by concealing his assets. Really, we conceive, that he is so tainted with fraud that the court will not lend him any assistance in recovering a penalty. Can he have any standing in court? Does he not occupy the position, by concealing his assets and perpetrating fraud on the court, of a party who has fraudulently disposed of his property. The object of the statute is to suppress usury. But it does not intend to reward the evil and wrong doer who, as the def't in error, has gone about seeking whom he may devour. But,
81 it is fair to him to say he has treated all alike. Beat his partner, his uncle, his creditors, and now asks you to assist him to make a judicial robbery. Without putting one cent of his own money in the transaction, he seeks to gain from the bank a penalty of over $2,000.00 for interest of which he never paid one cent. The small amount he claims to have paid came really from the cattle he bought with the bank's money.

Can the court say that this case comes within the intendment of this penal statute when strictly and literally construed?

Your petitioner represents that the defendant in error and Howard Martin, Esq., one of his attorneys of record, reside in Parker county, Texas, and that Wayne H. Lasater, another of his attorneys of record resides in Palo Pinto county, Texas.

Wherefore petitioner prays for a writ of error in said cause to the end that said cause may be brought before this court, and the aforesaid errors reviewed and corrected.

THOS. D. SPORER AND
E. W. NICHOLSON,
Attorneys for Plaintiff in Error.

Post office, Jacksboro, Texas.

Filed in court of civil appeals for second supreme judicial district of Texas, May 4, 1903.

W. C. STRONG, *Clerk.*

Filed in supreme court, May 9, 1903.

F. T. CONNERLY, *Clerk.*

CLERK'S OFFICE, SUPREME COURT.

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the foregoing eleven pages contain a true and correct copy of the petition for writ of error in application No. 3785, The First National Bank of Jacksboro (applicant) plaintiff in error *v.* J. L. Lasater, defendant in error, which said petition for writ
82 of error is now on file in this office.

Witness my hand and the seal of the supreme court of
[SEAL.] Texas, at the city of Austin, this the 20th day of June A. D. 1903.

F. T. CONNERLY, *Clerk.*

Judgment of Supreme Court of Texas Refusing Writ of Error.

In Supreme Court of Texas.

FIRST NAT'L BANK OF JACKSBORO
vs.
J. L. LASATER. } 2nd District.

MAY 12TH, 1903.

This day came on to be heard the application of The First National Bank of Jacksboro for a writ of error to the court of civil appeals for the second district, and the same having been duly considered, it is ordered that said application be refused; that the applicant The First National Bank of Jacksboro pay all costs incurred on this application.

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on said application for a writ of error.

Witness my hand and the seal of said court, this the 28th day of May, A. D. 1903.

F. T. CONNERLY, *Clerk*,
[SEAL.] By J. S. MYRICK, *Deputy*.

Bill of Costs in Supreme Court of Texas on Application for Writ of Error.

CLERK'S OFFICE, SUPREME COURT.

FIRST NATI'L BANK OF JACKSBORO *vs.* J. L. LASATER. } No. 3785. Certified Copy Bill of Costs Supreme Court.

	Filing application	.50
	Docketing petition	.50
	Entering appearance of counsel	.50
	Filing two briefs	.60
83	Filing three papers	.90
	Entering orders	.50
	Entering judgment on application	1.00
	Certified copy of judgment	1.00
	Taxing costs of application	.50
	Certified copy bill of costs	1.00
	Total	$7.00

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

[SEAL.] F. T. CONNERLY, *Clerk*.

Filed in court of civil appeals second supreme judicial district of Texas, May 30, 1903.

W. C. STRONG, *Clerk*.

Bill of Costs in Court of Civil Appeals.

J. L. LASATER
vs.
FIRST NATIONAL BANK OF JACKSBORO.

No. 3919. Bill of Costs in Court of Civil Appeals, 2nd Dist.

Filing record	.50
Docketing cause	.50
Appearances	1.00
Filing and entering motion	.35
Orders	2.50
Filing papers	3.00
Continuances	.40
Judgment	1.00
Taxing costs	.50
Mandate	1.50
Recording opinion	5.40
Certified copy of bill of costs	.70
Certified copies of motion	2.60
Issuing notices to c-unsel	8.00
Issuing citations in error	3.00
Issuing precepts	4.00
84 Sheriff's fees	9.25
Making transcript for U. S. Supreme Court	33.60
Total	$77.80

I, W. C. Strong, clerk of the court of civil appeals for the second supreme judicial district of Texas, do hereby certify that the above and foregoing 83 pages of typewritten matter contain a true and correct copy of all the proceedings had in said court in cause No. 3919 wherein J. L. Lasater is appellant and The First National Bank of Jacksboro is appellee.

Witness my hand and the seal of said court at Fort Worth, Tarrant county, Texas, this the 23rd day June A. D. 1903.

[Seal Court of Civil Appeals of the State of Texas.]

W. C. STRONG,
Clerk of the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

85 [Endorsed:] No. —. First National Bank of Jacksboro, Texas, plaintiff in error, *vs.* J. L. Lasater, defendant in error. From the court of civil appeals for the second supreme judicial district of Texas.

Endorsed on cover: File No. 18,993. Texas court of civil appeals, 2d supreme judicial district. Term No. 73. The First National Bank of Jacksboro, plaintiff in error, *vs.* J. L. Lasater. Filed July 3d, 1903.

8—73

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 73.

THE FIRST NATIONAL BANK OF JACKSBORO, PLAINTIFF IN ERROR,

vs.

J. L. LASATER.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

This is a case upon a writ of error from the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas, the same being the highest court of law or equity of the said State in which a decision could be had between the plaintiff in error here and the defendant in error here, wherein was drawn the construction of a clause or statute of the United States, to wit: Section 5198, of the Revised Statutes of the United States, and also of the Bankrupt Act of 1898, and this cause is here under the provision of 709 of the United States Revised Statutes.

A suit was brought by J. L. Lasater, the defendant in error here in the Forty-third Judicial District of the said State of Texas against the First National Bank of Jacksboro, plaintiff in error here, to recover from the bank twice the sum of $1,526.80, usurious interest alleged to have been paid to it by said J. L. Lasater, which amount was alleged to have been greater than the legal rate of interest allowed by said State of Texas, growing out of a transaction wherein the said J. L. Lasater and one W. M. Haggard, as partners dealing in cattle, borrowed from the bank the sum of $4,000, on the 30th day of March, 1898, and executed their joint note therefor in the

sum of $4,350, with one A. M. Lasater as surety, due November 15, 1898, with ten per cent interest after maturity, and also mortgaged the property purchased as further security.

Payments were made at various times on said note, as shown by the record on file, pp. 5 and 6, and in November, 1899, the said J. L. Lasater purchased all the interest of said Haggard in the partnership cattle and assumed all liabilities, but nothing was said at the time of said sale to the defendant in error about a claim against the bank for usury.

After said purchase by said J. L. Lasater of the interest of said Haggard he (the defendant in error here) gave a renewal note, with said A. M. Lasater as surety, and on the 15th day of October, 1900, he sold and transferred all of the mortgaged cattle and some other cattle to the said surety, A. M. Lasater, and the latter assumed and agreed to pay the note to the bank in full in consideration of said purchase and sale, which he, the said A. M. Lasater, subsequently did, June 17, 1901.

Defendant in error here on the 19th day of November, 1900, filed his voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Texas, and was duly discharged of all his debts January 7, 1901, six months before the final payment of the last note by the surety, A. M. Lasater.

The defendant in error here, at the time of filing his voluntary petition in bankruptcy as aforesaid, returned no assets to his trustee, and had none, unless this claim against the bank was an asset, and did not tell his trustee in bankruptcy anything about a claim he had against the plaintiff in error here for usury. He said, "I did not tell the trustee about this claim or the creditors." Record, p. 25, of the record.

The facts are all set out in the record on file and will be found pp. 20 to 27.

Upon a trial of the suit before the Judge of the Forty-third Judicial District aforesaid, the court rendered a finding for the plaintiff and judgment against the defendant in error here for costs.

Defendant in error here thereupon appealed to the Court of Civil Appeals of Texas, which court, upon hearing, reversed

the finding and judgment of the district court and rendered a judgment against the plaintiff in error here in the sum of $2,013.80, which sum, as found by said court, is double the amount of interest alleged to have been collected, excepting such sum as was barred by the statute of limitations.

Whereupon the plaintiff in error here applied for a writ of error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, which had jurisdiction in the case, upon which writ of error the last-named court affirmed the finding and judgment of the Court of Civil Appeals.

A writ of error was thereupon applied for to the Supreme Court of the United States upon the ground that there were Federal questions involved, and upon which the decision of the said Court of Civil Appeals, Second Julicial District, was based, which application was granted.

Two Federal questions are involved, as stated by the Chief Justice of said Court of Civil Appeals for said Second Supreme Judicial District, as shown pp. 6 and 7 of the record.

"1. The construction of Section 5198 of the U. S. Revised Statutes, prescribing a penalty against national banks for knowingly charging and receiving usurious interest.

"2. The construction of the National Bankruptcy Act of 1898 as to the right of a voluntary bankrupt, after he has been discharged, and his estate closed in the bankrupt court, to sue for the recovery of the penalty prescribed by the U. S. Revised Statutes." Record, pp. 6 and 7.

The questions therefore to be decided by this court, as presented by the record, are:

1. Was J. L. Lasater entitled on the facts stated to recover the penalty sued for as usurious interest paid for desiring the continuance of the partnership?

Was J. L. Lasater, by reason of his having assumed the payment of the debt due the bank when he purchased the interest of his partner, Haggard, precluded or limited in his recovery to one-half he would otherwise be entitled to?

Was the payment made by A. M. Lasater, the surety, to be regarded as a payment of the defendant in error here, J. L. Lasater?

2. Was the discharge in bankruptcy of J. L. Lasater, defendant in error here, a bar to his recovery in his action against the plaintiff in error here, viz., the First National Bank of Jacksboro?

The assignments found on page 2 of the record set out clearly the errors relied on to reverse the ruling of the court below, and are substantially as follows:

1. The court erred in holding that J. L. Lasater (the defendant in error here) had the right to sue for and recover in this action the penalty prescribed by Section 5198 of the Revised Statutes of the United States merely because he had been a member of the firm that paid part of the usurious interest, because the penalty is not assignable, and one member of a firm cannot sue to recover a penalty for usurious interest paid by the firm.

2. The Court of Civil Appeals for the Second Supreme Judicial District of Texas erred in holding that defendant in error here could sue for and recover the entire penalty.

3. The court erred in holding that a payment by A. M. Lasater, who was a joint maker of said note, was a payment by J. L. Lasater; but that the same was made under an agreement between appellant and said A. M. Lasater; and that the reception of such payments by said bank from A. M. Lasater was knowingly received by it as a payment from and for appellant (defendant in error here) when said bank was not a party to said agreement and was not informed at the time A. M. Lasater paid said note, together with the alleged usurious interest, that he was making such payment for appellant (defendant in error here), J. L. Lasater.

4. The court erred in holding that said appellant (defendant in error here) could maintain a suit to recover the penalty, as he had filed to voluntary petition in bankruptcy and had been discharged, as under the law all his property, including the claim against the bank, had passed to the trustee in bankruptcy, who was the proper plaintiff in this action, if any one.

5. The court erred in this, to wit: that by the record aforesaid it appears that the judgment of the said Court of Civil Appeals was given for the said J. L. Lasater against the First National Bank of Jacksboro, whereas by the law of the land

the said judgment ought to have been given for the said First National Bank and against the said J. L. Lasater.

It will be seen that the assignments of error set out contain all the specifications relied on by the plaintiff in error here.

The three assignments of error first named may be considered together.

The fourth assignment is a separate proposition.

If the court reverses the ruling of the Court of Civil Appeals of said Second Supreme Judicial District on any one or all of the first four assignments it follows that the fifth assignment is well taken.

The facts as shown by the record are all contained in the statement and finding of the judge of the Forty-third Judicial District, before whom, as above stated, the case was originally tried.

The action of the defendant in error here is based upon a penal statute, viz., Section 5198, U. S. Revised Statutes. It must therefore be strictly construed.

We negative the several propositions we have set out, and our contention is that the defendant in error here had not the right to sue and recover in the action brought by him.

To the first proposition, Was J. L. Lasater entitled on the fact stated to recover the penalty prescribed by the statute?

We contend he had not, for two reasons: First, because, as shown by the record, the defendant in error here and his partner, W. M. Haggard, had paid a part of the usurious interest alleged to have been received by the bank before he had purchased his partner's interest in the partnership effects; therefore, the partner had no ownership in the claim, which he had never divested from himself; and, second, if he had made a valid purchase of his partner's interest in the claim for the penalty prescribed before the bringing of the action upon which the writ of error is based, he had parted with it by making a sale and transfer of the same to his surety, A. M. Lasater.

It should be borne in mind that in all these transactions between the two partners and between the partners and the surety

that the plaintiff in error here had no knowledge of them and was not a party to them.

We claim, therefore, that the defendant in error here and W. M. Haggard, as partners, were jointly liable for the indebtedness of the firm, and were therefore joint makers of the note. If joint makers, J. L. Lasater could not sue for the penalty paid by his partner. If payments were made by both partners, each had an interest in what was paid, and in this case, as shown by the record, payments were made before the sale of Haggard's interest in the partnership to the defendant in error here.

The attorneys for the plaintiff in error here, in preparing their case for the Court of Civil Appeals, made an exhaustive search of the authorities bearing on the several questions presented by the record, and cited the case of the Columbia National Bank v. Rowley, 52 Kan., 394, wherein it was held that under Section 5198 of the U. S. Revised Statutes, which authorizes persons paying usurious interest to a national bank to recover twice the amount of interest paid one of the joint makers of a note on which illegal interest is charged, cannot recover the penalty from the bank when the illegal interest was paid by the other maker.

The same principle is held Timberlake v. First National Bank, 43 Fed. Rep., 231.

The truth is, the defendant in error here, at the time he purchased the interest of his partner, Haggard, did not buy his (Haggard's) right to sue for and recover usurious interest, and Haggard says he did not sell him any such right of action, and that nothing of the kind was mentioned to him by defendant in error. See record, p. 26. If he did not sell such a right, and the defendant in error here did not purchase it, how, then, can he sue to recover something he had never bought and which his partner had never sold?

We claim that the illegal interest, if any was charged and received, being a penalty, could not have been sold; or, if it should be held that the penalty could be bought and sold, the defendant in error here had parted with his interest in it before he brought his suit.

We contend that a penalty cannot be brought and sold as ordinary assets are purchased and transferred.

The defendant in error here was purchasing a penalty when he bought his partner's interest in the cattle. Payments had been made before the sale to J. L. Lasater, and one of the questions asked is whether he can sue for more than one-half of the penalty.

We assert, therefore, that a penalty is never assignable. Paine v. First National Bank, 5 Kan., App. 5-12.

The Supreme Court of Pennsylvania, in the case of the Monongahela National Bank v. Overholt, 96 P. St., 327, which is cited both by the attorneys for the plaintiff in error and the Chief Justice of the Court of Civil Appeals, and to which we shall refer later when we come to argue the second branch of the case in judgment, says: "Rights of action for writs to the debtor's person do not pass, *nor the right to sue for a penalty;* these are not assignable."

Farmers and Mechanics' Savings Co. v. Bozee, 54, S. W. Rep., 339, reported from the Supreme Court of Arkansas, decides that "where a partner assumes to pay a firm debt he cannot plead usury as to his partner's half of the debt."

Matthews v. Paine, 14 S. W. Rep., 463, an Arkansas case, decides that one member of a firm cannot sue to recover usury on a loan either before or after the dissolution following:

McFerrin v. Woods, 3d Bax. 4 (62 Tenn.), 242, which decides that "neither before nor after the dissolution of a firm can one member sue for and recover money individually when the money was borrowed by the firm."

The reasoning of the Court of Civil Appeals upon this branch of the case, we believe, is unsound. The court—Associate Justice Hunter speaking for it—says: "Has the remaining member of a partnership who has purchased all the retiring member's interest in the firm and agreed to pay all the debts the right to maintain this action?" Having propounded this interrogatory, the court decides that as between the partners, one having sold all his interest, the survivor had the right to bring the action as his legal representative.

We believe we have satisfactorily shown that this kind of a claim, being in the nature of a penalty, cannot be assigned. Moreover, the authorities cited by the court do not, in our judgment, sustain its reasoning, as we believe we can show.

The court below further said, p. 33 of the record: "Now, if this claim against the bank was an asset of the firm, and the survivor could recover in case of the death of his partner, the writer at least can see no reason why he may not recover it in case of the retirement of the partner."

There is a broad distinction between the right of a partner retiring from a firm and making a sale of all the ordinary assets belonging to it and one retiring and making a sale of assets which are of a doubtful nature, and which are not real assets, but penalties.

We know that the effects of a bankrupt or an insolvent debtor are held to be assets.

A penalty can hardly be called an asset which is salable.

"A penalty is defined as a punishment imposed by statute as a consequence of the commission of a certain specified offense.

"The term also denotes money recovered by virtue of a statute imposing payment by way of punishment."

Assuming the above definitions are correct, was this claim for usury an asset within the ordinary meaning of the word? As we shall show later on, if it was an asset it belonged to his trustee and not to himself.

Before reaching that question, however, we contend that if the Court of Civil Appeals is correct in holding this to be an ordinary asset, and that the defendant in error was entitled to it as the legal representative, it has been sold twice; first, to J. L. Lasater; second, to the surety, A. M. Lasater, who purchased all of the assets of the surviving partner, and who made the final payment of deferred interest. A. M. Lasater says—p. 27 of the record: "When I bought the cattle plaintiff did not reserve the right to sue for usury." The defendant in error here testified—p. 25 of the record: "At the time I sold the cattle to my uncle, A. M. Lasater, there was not anything said about the usury in the debt he was to pay. I did not reserve my right to sue for it."

It is difficult from the above facts, in view of the authorities cited, upon what hypothesis the court reached its conclusion.

We are aware, however, that the court below rested its decision on the first question in this case on the ground that the

defendant in error here was the "legal representative" of his partner, W. M. Haggard, and as such had a right of action. The Court of Civil Appeals, by Associate Justice Hunter, says—p. 34 of the record: "The 'terms legal representative' have been held to apply 'to all persons who, with respect to another's property, stand in his place and represents his place and represents his interest, whether transferred by them by his act or by operation of law,' citing a number of authorities. We will not enumerate them, but refer to those which have the greater bearing on the case. We have carefully examined all of them, and, in view of the facts presented in the record, we may be pardoned when we say that we do not believe they can be held as precedents to sustain the reasoning of the court below.

The decision in the case of Mutual Life Insurance Co. v. Armstrong, 117 U. S. 998, first referred to, is based upon facts which have no bearing upon the question at issue here. The Supreme Court simply decides that "An endowment policy of insurance payable to the assured or his assigns at a certain date or to his legal representatives if he should die before that time is assignable by the assured when the assignment is not made to cover a speculative risk, and the insurance passes to the assignee, although the assured die within the period."

No one questions that decision. It is sound, but the facts upon which the rule is applied regarding legal representatives of a person are not analagous to the case we are considering.

The case of New York Life Insurance Co. v. Flack, 3d Md., 341, is one where an insured person assigned all his interest to an assignee "for sole and separate use of his wife * * * her executors, administrators, and assigns." The court held, very properly, that due notice had been given to the company and the trustee was enabled to sue. There was no question raised as to who was the legal representative in this case, and it is not an authority to sustain the defendant in error here.

The case of Henderson National Bank v. Alvis, 91 Ky., 146, was a suit where the assignee brought the suit and not the person who had sold and assigned his interest. That is not our case. The facts are not analagous. We contend that if J. L. Lasater was the assignee of W. M. Haggard, then A. M. Lasater became the assignee in turn of the defendant in error.

The case of Louisville Trust Co. v. Kentucky National Bank, 87 Fed. Rep., 143, is not in point. The court held in that case

that the Trust Company had a right of action because it became the general assignee of the person interested; therefore had a right of action. If A. M. Lasater had brought the suit for deferred usurious interest paid then the above-named case might have been in point.

The case of the Louisville Trust Co. v. Kentucky National Bank, 102 Fed. Rep., 442, is the same as that in 87 Fed. Rep., 143 Supra, and it certainly does not sustain the position taken by the Court of Civil Appeals.

The learned judge, however, in the latter hearing, made a declaration which is authority to sustain our contention on the second branch of this case, and to which we make reference now. He said in his opinion a dead person and a bankrupt cannot sue. That is what we shall contend when the second question in this case is reached; that under the facts in the case here the bankrupt could not sue.

We have examined all the remaining authorities cited by the learned justice, and, in our opinion, none of the cases referred to on p. 34 of the record, when the facts in each are considered, can be construed as precedents which should sustain the contention of the defendant in error.

The court below (p. 34 of the record) refers to Taylor v. Sturgess, 5 Tex., 140, where the Supreme Court of that State, in an opinion by Justice Raney, held that "one who has a right of action for double the amount of usurious interest paid by him under Article 3106, Revised Statutes of Texas, can assign the right to maintain the action thereon." The court (p. 34 of the record), after quoting the statute, quotes the language of the Chief Justice, which is as follows: "This statute gives a right of action to one paying usurious interest, and in case of death such a right would become an asset of his estate, subject to administration," citing Railway Co. v. Freeman, 57 Tex., 156.

The latter case is one where a person had cattle killed by the cars, and it was held to be an assignable claim; the court, in deciding the case, declared it assignable, the tort not being one to the person, but to the estate.

That case cannot be regarded as an authority to sustain the claim of the defendant in error here. Taking either horn of the dilemma; if the claim was an assignable asset and could

be bought and sold, he had parted with it and transferred it to A. M. Lasater, his surety (and we have already shown he did not retain it); and if he did not sell it to A. M. Lasater, his trustee in bankruptcy was entitled to it; and, if it was concealed from his trustee, his creditors are now entitled to it. The title in such a case in action certainly cannot lapse.

The court below, Associate Justice Hunter speaking for it (p. 35 of the record), assumed that "the payment made by A. M. Lasater, the surety, who purchased the mortgaged cattle from appellant (defendant in error here), and in consideration thereof agreed to pay the note to the bank, and in discharge thereof executed his own note, which was afterward paid, was in law a payment by appellant (defendant in error here) in property, and the same as a payment in money," citing again Taylor *v.* Sturgis, 5 Tex., 140, and Hough *v.* Hersey, 36 Md., 184; Low. *v.* Pritchard, 36 Vt., 183; Richardson *v.* Baker, 52 Vt., 617; Bank *v.* Bingham, 50 Vt., 105; Nelson *v.* Cooley, 20 Vt., 201 (Vol. 27, Am. & Eng. Enc., 960).

At the risk of repetition, we again say that the payment by A. M. Lasater of the last note paid to the bank was not a payment by the defendant in error here, the latter having parted with it. As a mere question of fact, it could not be so considered, because the defendant in error had been discharged of all his debts in January, 1901, and the note was not paid by A. M. Lasater until six months later. How is it possible to thus hold an asset?

The authorities cited above are none of them based upon facts which make them parallel or analagous to the case at bar.

In parting with the first question to be decided we insist that the court below erred in rendering the decision and judgment of the judge of the Forty-third Judicial District. If the claim was a penalty it could not be assigned, and his partner had never sold it. If not assignable the partner, W. M. Haggard, has the right to sue for one-half of the amount of usurious interest which was paid while he was still in the firm unless barred by the statute of limitations. If assignable, it has been sold to A. M. Lasater, who made the final payment of interest and who has the right to sue if the statute of limitations does not intervene.

We will now take up the second question which must be decided, viz.:

Was defendant in error here discharged in bankruptcy a bar to his recovery in the action brought by him against the plaintiff in error?

Our contention is that he was, and that he ought to have no standing in court.

We claim and insist that all of the property belonging to a bankrupt passes to his trustee.

Under Section 70 of the Bankrupt Act of 1898 the trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt, except in so far as it is to property which is exempt: 1. All documents relating to his property. 3. Powers which he might have exercised for his own benefit, but those which he might have exercised for some other person. 4. Property transferred by him in fraud of his creditors. 5. Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial proceedings."

Under this act the bankrupt could not conceal anything. Every asset or claim ought to be scheduled and turned over to his assignee.

The learned judge of the Court of Civil Appeals who rendered his opinion reversing the ruling of the judge of the District Court (p. 35) has little doubt but that notwithstanding all the facts the bankrupt, although concealing the claim for usurious interest, after having received his discharge in bankruptcy and being free from all indebtedness, has the right to retake the title to this concealed penalty, or asset, notwithstanding the fact that he never claimed it in his purchase of his partner's interest in the partnership effects, and never retained it in the sale of all his property to the surety.

The Chief Justice of the Court of Civil Appeals, in his opinion on certified question (p. 44), on the contrary, seems to have some doubt on the question, but finally decided in favor of defendant in error here.

The first judge named (Associate Justice Hunter) says (p. 35 of the record):

"There is no merit in appellee's (plaintiff in error here) contention that because of appellant's (defendant in error here)

bankruptcy he cannot recover in this claim." He is, however, of opinion that the trustee in bankruptcy would have been entitled to sue for this claim, citing authorities pro and con, and he says: "But both bankrupt and trustee had bten discharged when this suit was filed. * * * But the fund in this instance was never reduced to possession nor claimed by the trustee or creditors, and it does not lie in the mouth of the usurer to say the appellant (defendant in error here) shall not now recover it. By knowingly violating this plain statute the bank became liable to him for twice the sum of interest so charged and received by it," citing authorities.

We will not review the cases referred to on the question of usury, but we contend that the reasoning of the learned judge is somewhat peculiar. Why was not this claim reduced to the possession of the trustee or claimed by him or the creditors? The answer is easy; because it was concealed, hidden away in the brain of the bankrupt, and the trustee could not know it so as to demand a right to sue on it, and the creditors could not demand that the claim be sued upon and reduced to a judgment for their benefit. The defendant in error says (p. 25 of the record) he did not reserve the right to sue for it, and he never told his trustee that he had such a claim.

The defendant in error further says (pp. 25 of the record): "After I was discharged in bankruptcy I changed my mind about suing for this claim for usury. The reason why I did so was because I needed the money in my business." Very frank and candid! to say nothing more. He was not unwilling to profit at his creditors' expense.

We ask, therefore, Is it possible that a bankrupt can hold any kind or sort of asset or chose in action and conceal it from his creditors and trustee and elect after he had been divested of his title to resume the ownership of it, sue for it, and recover it, and then when his creditors would demand what was their own he could fly in their faces his discharge in bankruptcy? Is the bankrupt the party to elect under such circumstances? Can he make a football of a chose in action, no matter what may be its nature, and turn it to his own benefit in the end? His statements show he was not governed by any higher sense of his duty to his creditors than was the plaintiff in error, whom the judge of the Court of Civil Appeals condemns in plain language.

But the learned judge in saying "It does not lie in the mouth of the usurer," &c., did not repeat or refer to the legal maxims, "He who seeks must do equity," and "A party coming into court must come in with clean hands." Here is an instance of a man concealing a claim which if valid under the facts—and we believe it was not—of right belonged to his creditors, getting a discharge, and being free from all his debts, immediately upon a release from all liabilities bringing a suit to recover what was not his own. He is not in a position to claim benefits until he has purged himself from all fraud.

The authorities, however, relied on by the learned judge regarding the rights of the defendant in error here do not sustain the position taken by him.

Herndon *v.* Davenport, 75 Tex., 462, held that "After bankruptcy proceedings were closed property of the bankrupt not disposed of reverted to the bankrupt. The title which vested in the assignee in bankruptcy cannot be used as an outstanding title to defeat the recovery of the land undisposed of when claimed by the heirs of the bankrupt."

That case is not in point. There was no question of concealment of assets. There was no effort to conceal the title of the land which was in the bankrupt.

The case of Jones *v.* Pyron, 57 Tex. 43, decides that "The mere omission to schedule bankrupt's property constitutes no ground either in law or equity for denying to the heirs of the bankrupt their title on the termination of the proceedings as against parties who have no other ground of attack than failure to schedule it." This is not our case. The facts upon which the decision is based are not analagous.

The case of Connor *v.* Express Co., 42 Ga., 37, cited by the learned justice, is authority favorable to the plaintiff in error here rather than against it. The decision is based entirely on the presumption that the assignee in bankruptcy had a knowledge of the asset, and for some reason did not see fit to control it. The court in deciding the question says: "The presumption is that the assignee as agent of the bankrupt court would not have been discharged leaving this claim undisposed of had there not been some proper reason for leaving it in the control of the plaintiff." There was no question in that case of a doubtful nature; no hint of consealed assets.

We have referred to Section 70 of the Bankrupt Act of 1898, and under this there can be no question but that this claim for usurious interest, if valid and subsisting, passed to the trustee in bankruptcy.

The chief justice of the court below (p. 43 of the record), in his opinion on certified questions, says: "The weight of authority sustains the proposition that when such cause of action as that asserted has accrued, it will, upon bankruptcy of the owner, pass to the assignee in bankruptcy." Then adds: "The authorities cited by the Court of Civil Appeals sustain the proposition that after the close of the administration of the bankrupt's estate and the discharge of the trustee unadministered assets may be recovered by the bankrupt. The decisions of the Supreme Court of the United States make somewhat doubtful the application of a proposition to a case like this, where the trustee had no knowledge of the asset, and where suit is brought recently after the close of the bankruptcy proceedings it may be reopened and further administration had." Here cites authorities, then adds: "The bankrupt law does not contemplate that any assets shall be left unadministered; but it sometimes happens there are such, and when neither creditors nor the trustee asserts right to them it is, we think, proper to regard them, at least as against a wrong-doer, as belonging to the bankrupt."

We believe we have already made it clear that as to the proposition that unadministered assets may be recovered by the bankrupt the authorities cited by the Court of Civil Appeals do not sustain its decision. The learned chief justice and the associate justice both lose sight of the fact when referring to a wrong-doer that the defendant in error has shown himself quite as much of a wrong-doer as the bank from whom he borrowed money.

As to the authorities cited by the learned chief justice, we have examined them carefully and there is no question but that they sustain the proposition that all of the assets of a bankrupt pass to his trustee. If they do, unless the trustee voluntarily returns them to him for good and sufficient reasons, he cannot reinvest himself to their title and use them if he has creditors.

The case of the Monongahela Bank v. Overholt, 96 Penn., 327, heretofore cited, not only sustains the proposition that the assets of the bankrupt pass to the assignee or trustee, but it sustains our contention and decides that the bankrupt has no

right of action after his discharge because the assets had passed and become vested in his trustee. This was a case directly in point to sustain our proposition. The bankrupt, after his discharge in bankruptcy, brought suit to recover usurious interest, and it was held to be no right of action.

The case of National Bank *v.* Trimble, 40 Ohio St., 629, which is also cited, is one which sustains our position. It decides: "If the payee of such interest before action brought was adjudged a bankrupt his assignee in bankruptcy became his 'legal representative,' and as such was entitled to bring the action." The fair deduction from this case is that after being adjudged a bankrupt a person could not again reach out and take in that from which he had been legally divested.

We have already referred to the statement of the learned chief justice of the court below wherein he says: "The decisions of the Supreme Court of the United States make somewhat doubtful the application of a case like this," citing Sessions *v.* Romadka, 145 U. S., 29; Sparham *v.* Yerkes, 142 U. S., 7; Dushano v. Beal, 161 U. S., 513.

An examination of the cases referred to more than make the question doubtful; they really sustain our contention. In Sessions *v.* Romadka, 145 U. S., Justice Brown states that it was possible for a bankrupt court to reopen a case where a patent had been concealed, and cited the case of Clark *v.* Clark, 17 Hon., 315-322. This latter case is an authority which, in our judgment, sustains our view of this question. It has never been, so far as we can learn, overruled. The court held that "Although the bankrupt and his future acquisitions are discharged from all his debts by the certificate in bankruptcy, yet the rights of property which vested in his assignee are still subject to his creditors, and the money arising therefrom is held in trust for them."

This is directly contrary to the position of the Court of Civil Appeals and the position taken by the Court of Civil Appeals for the Second Supreme Judicial District of Texas. The ruling of the two courts below seem to be based wholly upon the wrong-doing of one party, losing sight of the wrong-doing of the other, and turning property back to the wrong-doer who had creditors to whom he owed money and who of right were entitled to his assets.

The case referred to of Sparhawk v. Yerkes, 145 U. S., 1, and Dushane v. Beal, 161 U. S., 513, so far as the facts apply, sustain the position of plaintiff in error. The learned chief justice of the court below, however, puts the question upon the ground that "If such persons (creditors and trustee) do not choose to proceed no good reason is seen why the bankrupt himself should not be allowed to recover," citing Lancey v. Foss, 88 Me., 218. The case cited is decided upon the presumption that the assignee had knowledge of the claim owned by the bankrupt. The court says: "The assignee of a living bankrupt * * * may decline to take or interfere with such property as he deems onerous or worthless." Such is not our case. Answering the learned chief justice, we insist that up until the time the suit was brought neither the trustee nor creditors knew of this secret concealed claim; therefore, the trustee could not sue, and the creditors, knowing nothing of it, could not sue themselves or demand that the bankruptcy proceedings be reopened.

There is a case, lately decided, that is in point and is in line with the authorities, viz.: Monongahela National Bank v. Overholt, 96 Penn. St., 327 supra, and of Clark v. Clark, 17 How., 315. It will be found in American Bankruptcy Reports, Sept., 1904, 164. It is the case of Rand v. Iowa Central Railway Co. It is from the Supreme Court of New York, Appellate Division, First Department, July, 1904. The court held that where, after plaintiff's aleged cause of action accrued, he filed his petition in bankruptcy and was adjudged a bankrupt and obtained his discharge, and in the bankruptcy proceedings did not disclose the claim upon which this action was founded, in consequence of which no trustee in bankruptcy was appointed, the complaint is properly dismissed on the ground that the plaintiff is not the real party in interest, the bankruptcy proceeding having divested him of a right of action." We have no hesitation in asserting that this case is in point and sustains our contention.

So far as we can learn, no court, until the court below, has ever before held that a bankrupt can be divested of his title to assets by bankruptcy proceedings and conceal a part of them; then after his discharge revive his claim and be sustained in it because somebody else has done wrong.

There are other authorities cited and some other questions which might be taken up and discussed, but we deem it unnecessary to further refer to them.

As to the question of morals and right and wrong, we do not insist that two wrongs make one right; but we do insist, that the defendant in error here, because he chose to make a bargain with the bank whereby he expected to make money, cannot buy a non-assignable asset, then sell it, then go into bankruptcy and conceal it, when of right it belonged to his creditors and should have passed to his trustee, then get his discharge and be freed from his debts, then bring a suit to recover that asset which of right does not belong to him, should have no standing in court.

J. W. NICHOL,
Attorney for Plaintiff in Error.

THOS. D. SPORER,
E. W. NICHOLSON,
Of Counsel.

FILE COPY.

Office Supreme Court
FILED
DEC 3 19
JAMES H. McKENNEY
Clerk

Supplemental Brief for Plaintiff in Error.

In the

Supreme Court of the United States.

October Term, 1904.

No. 73.

THE FIRST NATIONAL BANK OF JACKSBORO, PLAINTIFF IN ERROR,

vs.

J. L. LASATER, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

J. W. NICHOL,
Attorney for Plaintiff in Error.

THOS. D. SPORER.
E. W. NICHOLSON.
Of Counsel.

In the

Supreme Court of the United States.

October Term, 1904.

No. 73.

THE FIRST NATIONAL BANK OF JACKSBORO, PLAINTIFF IN ERROR,

vs.

J. L. LASATER, DEFENDANT IN ERROR.

I.

We ask the indulgence of the Court in presenting a supplemental brief, as there are some authorities we have examined since our original was filed which we believe have a bearing on the case in judgment, and to which we wish to call attention.

We endeavored in the original brief to plainly present the question as to the rights of J. L. Lasater, the defendant in error here to sue for and recover usurious interest alleged to have been collected by the plaintiff in error, viz.: The First National Bank of Jacksboro. Our contention was—and is now—that upon the facts shown by the record the defendant in error has no right to sue for the alleged usurious interest, and under no circumstances, as developed by the evidence, has he a standing in court.

We said that if the claim, being based upon a penalty, was non-assignable, his partner, W. M. Haggard, had an ownership of one-half of the amount of usurious interest paid before the dissolution of the partnership. Indeed, he (Haggard) says (transcript, p. 26) in speaking of selling his partnership interest: "In said trade I did not sell my right, or any

right, to J. L. Lasater to sue the First National Bank of Jacksboro, Texas, or any one else for a penalty for charging usurious interest; nothing of this kind was mentioned to me by said J. L. Lasater or any one else, and I did not sell any such right of action. If there ever was any such right it belonged to me."

This fact is not controverted and nothing in the record is shown to the contrary. We are well aware that the Court will not reverse a case on the mere weight of evidence, but when all the facts show that an incorrect decision has been rendered, the testimony offered, will be considered.

We further contended in our first argument offered, that if assignable, the defendant in error had parted with all his interest to the claim in question to his surety, A. M. Lasater, who was not only a surety but a joint maker of the original note.

Moreover the defendant in error did not pay the final instalment of usurious interest which he now seeks to recover.

It is shown by the record that the defendant in error here, on the 15th day of October, 1900, sold all of the partnership cattle to his surety, A. M. Lasater, who assumed the payment of the debt owing to the bank, and gave his own note in lieu of it, and it is further shown by the record that defendant in error filed his voluntary petition in bankruptcy November 19, 1900, but did not mention this claim for usuary and did not schedule it, and was discharged free from all debts or liabilities January 7, 1901, and the final payment of interest, usurious or otherwise, was not made by the surety until June, 1901, eight months after his sale of all interest in the partnership assets, and six months after his discharge in bankruptcy. It is difficult to see on said facts—which are not only not controverted but admitted—upon what hypothesis the defendant in error has any right of action or any pretense thereof. It can hardly be assumed that the surety would have left a claim for usurious interest in the hands of the principal when he was paying the entire debt. He would have raised the question and considered it.

But the gravamen of the matter involved in this controversy is whether the defendant could secretly retain a penalty after his various dealings with his partner, his surety, and the bank.

We have cited in our original brief Monongahala Nat' Bank *v.* Overholt, 96 Pa. St., 327; Farmers' and Mechanics. Savings Co. *v.* Bozee, 14 S. W. Rep., 443, and McFerrin *v.* Woods, 3 Baxt (62 Tenn.), 242.

We refer now to the the case of Bullard *v.* Raynor, 30 N. Y., 197, wherein the court held that "Usury is a defense personal to the party known as the borrower; he cannot transfer to another the right he has to allege and prove the demand to be usurious.

This case differs from the one at bar in this, that there was a public assignment, and in the case we are treating there was a concealed asset which the defendant in error intended to make available after he had been free from all obligations to pay his just debts.

We also referred to the case of Pardoe *v.* First. Nat. Bank, 5 Kan., App. 512. It should have been Lloyd *v.* First Nat. Bank, 5 Kan. App., 512, which decides that "a cause of action for usurious interest paid to a national bank in a note given for a loan is not assignable.

The case of Pardoe *v.* Iowa National Bank, 106 Iowa, 345, decides that "The right conferred by the United States Revised Statutes, sec. 5198, upon a debtor from whom usurious interest has been exacted by a national bank, or its legal representatives to recover back twice the amount is personal and cannot be transferred by ordinary sale or judgment." The Court says: "It is a well-settled rule that a defense based upon usury is personal and cannot be maintained by a stranger to the contract. Citing Carmichael *v.* Bodbish, 32 Iowa, 418; Miller *v.* Clarke, 37 Iowa, 325; Insurance Co. *v.* Olmstead, 37 Iowa, 854.

That is not altogether our case. By law a claim for usurious interest owned by a bankrupt is a thing of value and belongs to his creditors and becomes an assignable quantity to a trustee or assignee under a State insolvent

law or a Federal law in bankruptcy, and so the courts hold.

We deem it unnecessary to more than refer to the rule that a penal statute must be strictly construed. The authorities cited by counsel for plaintiff in error in preparation of application for writ of error, pp. 50, 51, of the record fully sustain such rule.

II.

We believe we have clearly shown in our original brief that under the Bankrupt Act of July 1, 1898, all of the assets of the latter pass to the trustee, nevertheless there are some authorities bearing upon this question to which we wish to call to the attention of the Court.

The Supreme Court of Connecticut, in a well considered case, Loomer *v.* Loomer, 76 Conn., 522, held that " Beneficial interests and not wholly unrestrained and under the control of the beneficiaries of a will are alienable and may be subject to the rights of creditors, and that equitable interest pass to the master in bankruptcy.

This is a case where two sons of a testator at the time of their application as bankrupts were each, as *certui que trust*, entitled to one-eighth of the net income of a trust estate during the continuance of the trust to pay income and were each the owner of an equitable remainder in fee to an undivided one-eighth of the trust estate, with the right to have the full legal title thereto upon the termination of the trust. The court held as above stated, and such interest passed to the trustee in bankruptcy.

The question, however, to be determined here is, whether a bankrupt, having been divested of his title to all of his assets, and concealing a part of them, can, after his discharge, become revested with the assets he has concealed? We endeavored in our original brief to make it clear that such playing fast and loose with assets was not consistent with equity and good conscience, and we referred to some decisions sustaining our contention. We now wish to call attention to some additional authorities on the subject which we have examined.

The courts have never looked with leniency on the concealment of assets, and parties concealing them have not as a rule been allowed to retain them when the right to their ownership was questioned.

In re Paine 127 Fed. Rep. 246, Evans J., it was decided that "a trustee may bring a suit or file a petition within a reasonable time to reopen the case if the bankrupt has fraudulently concealed assets."

In the case of *in re* Morrison 127 Fed. Rep. 186, it was held that "where a member of a firm filed a petition individually to be adjudged a bankrupt, and the petition was silent as to partnership assets and liabilities, though the schedule declared individual and partnership debts, and the creditors of the firm were not notified, the bankrupt was not entitled to a discharged from firm debts, though the firm had been dissolved and was without assets and the firm debts were barred by limitation.

It was decided in case *in re* Fiergenbaum 121 Fed. Rep. 69, "that a bankrupt who has been refused a discharge of fraudulent concealment of assets from the trustee may not a few months thereafter file a new petition alleging the same facts and prevent a new application for a discharge."

In Fowler *v.* Jenks 95 N. W. Rep. 887, it was held that "where a bankrupt estate was reopened for the reason that the bankrupt had fraudulently concealed certain property, the effect was to place the parties in the same relation they were before the estate was closed and the bankrupt discharged, and the title to the concealed property did not revest the bankrupt after his discharge so as to deprive the court of jurisdiction upon the reopening of the estate."

The cases are cited for the purpose of showing that the almost uniform decisions of the courts are that after having been once divested of assets by bankruptcy proeeedings, concealed assets do not revest after discharge.

The case of Scruby *v.* Norman, 91 Mo. App. 517, is still more explicit in giving the status of a bankrupt after his discharge in regard to concealed assets. It is directly in point and sustains our contention. It is in line with the

decision of the Supreme Court of the United States in which we have referred, p. 16 of our former brief and with the cases of Monongahalia Nat. Bank, 96 Penn. St., 327, and Rand *v.* Iowa Central Railway Co., American Bankruptcy Rep., Sept., 1904, 164 *supra.*

In the case of Scruby *v.* Norman, *supra*; a party brought suit upon a promissory note and upon a trial of the case a judgment was rendered for the defendant. The plaintiff then under Act of July 1, 1898 filed a petition and was adjudged a bankrupt, and a trustee was appointed who took charge of his estate, and neither received or paid out any money and was discharged. The debt in question upon which the suit had been brought was not scheduled. After plaintiff's discharge in bankruptcy he appealed from the judgment which had been rendered against him, and the defendant moved to dismiss the appeal on the ground that all the right, title and interest to the debt in question had passed to the trustee in bankruptcy, and he could not prosecute the appeal. In other words, having been divested of his title by his application and discharge in bankruptcy—all of his property having passed to his trustee—he could not after his discharge revert the title in himself.

The court dismissed the appeal. Smith, P. J., speaking says: "It is made manifest by the record of the proceeding of the Federal Court in the bankruptcy case that the interest of the plaintiff in the debt sued for in the present action was, by operation of law, transferred to the trustee of the estate." (Bankrupt laws of 1898, sec. 70. * * *) The interest of the plaintiff in the said debt having been divested by the bankrupt proceedings his right to prosecute this action for the recovery thereof was at an end. Unless that interest had been revested he can have no *locus standi* in the present appeal.

"Will the fact that said debt is not enumerated or referred to anywhere in the proceeding in bankruptcy as a part of the assets of the bankrupt's estate, or that the trustee took no steps to reduce it to possession, nor to have himself substituted as plaintiff in this suit, have the effect, after his discharge and that of the plaintiff as a bankrupt, to

revest in the latter, the interest that was divested by the bankrupt proceedings. That such would be the effect would be inconceivable."

We will not quote the court's reasoning in full. It sustains our contention in every particular. The learned presiding judge cites in conclusion: Malone *v.* Martin, 5 S. W, Rep., 909; Pickens *v.* Dent, 106 Fed. Rep., 653; Vandyke *v.* Shyrer, 98 Ind., 126; Boyd *v.* Adams, 82 Ind., 294; Seaton *v.* Hinsman, 50 Iowa, 395, Dessau *v.* Johnson, 66 How. Proc., 5; Atwood *v.* Thomas, 60 Miss, 162; Peters *v.* Wallace, 4 S. W. Rep., 914; Foraast *v.* Hyman, 28 N. E. Rep., 801.

Contra Frazier *v.* Desha's Admr., 40 S. W. Rep., 678.

We have examined the cases cited by the Missouri court, and with the exception of Frazier *v.* Desha's Admr. noted they sustain the position taken, and when the facts in the latter case are considered it cannot be regarded as an authority against the principle for which we have been contending.

The case of Malone *v.* Martin, 2 S. W. Rep., 909, decides that even where the assignee of a bankrupt is barred from asserting a title that fact does not revest the bankrupt with title.

The cases of Atwood *v.* Thomas, 60 Miss., 162, and Foraast *v.* Hyman, 28 N. E., 801 are almost directly in point, and they decide in effect that the title of a bankrupt once divested and invested in his trustee cannot be revested in himself after discharge. He is forever barred.

In the case of Peters *v.* Wallace, 4 S. W. Rep., 914, the court held that "The mere fact that the assignee in bankruptcy declines to sue for land claimed by the bankrupt or has really surrendered his right to do so, does not invest the bankrupt with title sufficient to support an action of ejectment by him."

We deem it unnecessary to further review the several questions presented by the record. We have carefully con-

sidered all phases of the case in judgment, and we believe upon every hypothesis the assignments of errors are well taken.

J. W. NICHOL,
Attorney for Plaintiff in Error.

THOS. D. SPORER.
E. W. NICHOLSON.
Of Counsel.

Supreme Court of the United States.

No. 73.—October Term, 1904.

The First National Bank of Jacksboro, Plaintiff in Error, *vs.* J. L. Lasater.	In error to the Court of Civil Appeals of the Second Supreme Judicial District of the State of Texas.

[January 3, 1905.]

This case is here on error to the Court of Civil Appeals of the Second Supreme Judicial District of the State of Texas. It was an action brought in the District Court of Jack County by J. L. Lasater to recover from the First National Bank of Jacksboro twice a sum claimed to have been paid as usurious interest.

The material facts are as follows: J. L. Lasater and W. M. Maggard, as partners, borrowed of the bank $4,000, and executed their joint note with A. M. Lasater as surety. They also mortgaged cattle as further security. Subsequently Maggard sold all his interest in the mortgaged property to J. L. Lasater, the latter assuming all liabilities and renewing the note with the same surety. Thereafter A. M. Lasater, the surety, bought all the mortgaged cattle and, as part of the consideration, agreed to assume and pay off the note. In pursuance of this agreement he took up the note of J. L. Lasater and gave his own note therefor. This last note A. M. Lasater paid in full to the bank. After all these transactions, and on November 19, 1900, J. L. Lasater filed his petition in bankruptcy in the District Court of the United States. On January 7, 1901, he was discharged of his debts, and on June 11, 1901, the trustee was also discharged of his trust. The bankrupt returned no assets to the trustee and did not tell him or the creditors about this claim for usury.

On July 26, 1901, he brought this action, under the authority of section 5198, Revised Statutes, United States, to recover twice the amount of the interest paid to the bank. The Court of Appeals found that part of the interest was paid more than two years prior to the commencement of the action, and held that no recovery could be had as to that, but, reversing the District Court, entered a judgment in favor of the plaintiff for double the amount of the balance of the interest, on the ground that usury entered into it all.

Section 5198, Revised Statutes, provides:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other

evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, Such action is commenced within two years from the time the usurious transaction occurred."

Mr. Justice BREWER delivered the opinion of the Court.

The mere discharge by A. M. Lasater of the note executed by himself and J. L. Lasater, by giving his own note in renewal thereof, would not uphold a recovery from the bank on account of usurious interest in the former note. *Brown* v. *Marion National Bank*, 169 U. S. 416. The payment contemplated by the statute is an actual payment and not a further promise to pay, and was not made until the bank, in June, 1901, received its money. Prior to the renewal by A. M. Lasater, in October, 1900, there were only two or three small cash payments on the indebtedness.

We shall not stop to inquire whether J. L. Lasater can avail himself of the final payment made by A. M. Lasater. The Court of Appeals held that he could, reaching this conclusion on the authority of cases like *Hoff* v. *Hersey*, 36 Md. 184; *Richardson* v. *Baker*, 52 Vt. 617, to the effect that the grantee of mortgaged property, who in consideration of the purchase agrees to pay off the mortgage, cannot raise the question of usury, that being a personal right of the original debtor.

The Court of Appeals also held that the claim for usurious interest was one which survived the death of the person in whom the right of action was vested, and under the laws of Texas a part of his estate, and consequently one that could be sold and bought like any other chose in action. If so, that claim passed to the trustee in bankruptcy under section 70 of the bankrupt law, which, in describing the property passing to the trustee, names "property which prior to filing of the petition he could by any means have transferred."

The question then presented is whether this right of action having once passed to the trustee in bankruptcy was retransferred to J. L. Lasater upon the termination of the bankruptcy proceedings, he having returned no assets to his trustee, and having failed to notify him or the creditors of this claim for usury, and beginning this action within less than two months after the final discharge of the trustee. We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character, and that they have a reasonable time in which to elect whether they will accept or not. If they decline to take the property the bankrupt can assert title thereto. *American File Company* v. *Garrett*, 110 U. S. 288, 295; *Sparhawk* v. *Yerkes*, 142 U. S. 1; *Sessions* v. *Romadka*, 145 U. S. 29; *Dushane* v. *Beall*, 161 U. S. 513. But that doctrine can have

no application when the trustee is ignorant of the existence of the property and has had no opportunity to make an election. It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value (as certainly this claim was according to the judgment below) it was something to which the creditors were entitled, and this bankrupt could not by withholding knowledge of its existence obtain a release from his debts and still assert title to the property.

The judgment of the Court of Civil Appeals is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.